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1986

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Recommended Citation

J. David Bleich, *The Controversy Concerning the Sotheby Sale*, 8 Cardozo Law Review 91 (1986).
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THE CONTROVERSY CONCERNING THE SOTHEBY SALE*

*J. David Bleich***

INTRODUCTION

During the latter part of June 1984, the prestigious auction firm, Sotheby Parke-Bernet, arranged the sale of sixty-one rare Hebrew books and manuscripts dating from the thirteenth to the nineteenth centuries. The two most valuable items—a hand-written Bible with the accompanying commentary of Rashi transcribed in Prague in 1487 and an illuminated Spanish High Holiday prayer book dating from the latter part of the fourteenth century—were sold privately for $900,000 to an anonymous purchaser who presented them to the Jewish Theological Seminary. The remaining books were sold at public auction on June 26, 1984. The public sale realized a total of $1.45 million. The auctioned items are known to have belonged to *Die Hochschule für die Wissenschaft des Judenthums* (the College for the Scientific Study of Jewish Culture), a Reform seminary in Berlin, which was closed by the Nazis in 1942. The books were heretofore presumed to have been destroyed by the Nazis during World War II. The first indication that the books and manuscripts had indeed been preserved came in April 1984, when Sotheby's announced that they would be offered for sale by an anonymous consignor on June 26th. The auction took place despite protests by numerous Jewish groups and a last-minute effort by New York State Attorney General Robert Abrams to prevent the sale. Later it became known that the purported owner was Dr. Alexander Guttmann, a former faculty member of the *Hochschule*, who subsequently became a professor of rabbinics at Hebrew Union College in Cincinnati. Dr. Guttmann contends that shortly after the infamous *Kristallnacht* in 1938, the President of the Board of Governors of the seminary presented the books to him as a gift so that he might smuggle them out of Germany. He maintains that he was approached to accept the volumes because he was in possession of an American visa, and that the books were conveyed to him gratuitously in order to induce him to spirit them out of Germany despite the great personal risk which such an undertaking entailed.

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* For a glossary of rabbinic texts cited herein, see Editor's note, infra, following note 95.

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The gift, claims Dr. Guttmann, was made in order that the books and manuscripts might be preserved for posterity.[1]

The Attorney General attempted to prevent the sale and, challenging Professor Guttmann's ownership of the books and manuscripts, obtained an order from the New York State Supreme Court freezing all proceeds derived from the sale pending a trial to determine the rightful owner.[2] Ultimately, the matter was resolved by means of a court-approved settlement.[3]

Although the controversy has been quieted by means of a compromise settlement accepted by the parties concerned, the case presents a number of intriguing issues of Jewish law (*halakhah*) relevant to the resolution of controversies concerning ownership of books rescued from the Nazis during the Holocaust era. An analysis of the *halakhic* issues presented in the Sotheby case is, therefore, of practical, rather than merely theoretical interest for those who conduct themselves in accordance with Jewish law. Moreover, although disputes regarding transfer of property are generally resolved in accordance with the law of the jurisdiction in which the property is situated at the time of transfer,[4] in this instance there are strong grounds for

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[1] See Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 9-10, Abrams v. Sotheby Parke-Bernet, No. 42255/84 (N.Y. Sup. Ct. Aug. 24, 1984).

[2] Abrams v. Sotheby Parke-Bernet, No. 42255/84 (N.Y. Sup. Ct. Aug. 24, 1984) (order granting preliminary injunction).

[3] Abrams v. Sotheby Parke-Bernet, No. 42255/84 (N.Y. Sup. Ct. Aug. 23, 1985) (stipulation and order of settlement). Under the terms of the settlement, Professor and Mrs. Guttmann are to receive $900,000. The Prague Bible and the Spanish High Holiday prayer book are to be returned by the Jewish Theological Seminary and purchased for $900,000 by another anonymous benefactor who will present the Prague Bible to Yeshiva University and the Spanish prayer book to the Hebrew University. Prior to delivery to these institutions, these books are to be made available for exhibition for three consecutive three-month periods at the Jewish Theological Seminary, the Hebrew Union College in Cincinnati, and the New York Public Library.

According to the terms of the settlement, those items which are not duplicated in the library of any public institution are to be returned by the purchasers and are to be allocated to various libraries upon the recommendation of the Jewish Restitution Successor Organization.

[4] See, e.g., Hutchison v. Ross, 262 N.Y. 381, 389-90, 187 N.E. 65, 68-69 (1933) (The validity and effect of a transfer of tangible personal property, as well as the capacity to effect such a transfer, are governed by the law of the state where the property is situated at the time of transfer.). Were this principle invoked in the *Sotheby* dispute, German law would apply. It is highly questionable, however, that any United States court would apply the law of Nazi Germany to such a case, since at the time that the events in dispute took place, Jews had been effectively denied access to German courts either as plaintiffs in suits involving non-Jews or for adjudication of disputes among themselves. Although Jews were not formally denied recourse to German courts until 1942, see 1 R. Hilberg, The Destruction of the European Jews 11 (rev. and definitive ed. 1985), as a practical matter, they were effectively barred from utilizing the legal institutions of the Third Reich in enforcing their rights even against fellow Jews at a much earlier date. See D. McKale, The Nazi Party Courts 136-37 (1974) (Lawyers were

asserting that New York courts should regard Jewish law as applicable in like cases both on grounds of comity[5] and because it is the law

threatened with expulsion from the Nazi party if they represented Jews in civil trials or in state courts.). The only forum of law available to Jews for resolution of disputes was rabbinic tribunals whose decisions were predicated upon Jewish law. See infra note 5.

[5] Attention to the rationale underlying the principle of comity would augur in favor of a determination that the applicable law is Jewish law. Comity is founded upon the notion that parties who rely upon a recognized and established system of law ought to be accorded the protection offered by that corpus of law so long as the result is not offensive to public policy. See Lorenzen, Huber's de Conflictu Legum, 13 Ill. L. Rev. 375, 403 (1918) (translation of Huber's classic treatise on comity). Jewish law, although not the law of any sovereign state, is recognized and established. Throughout the Middle Ages, and indeed until the period of the Emancipation, Jews were granted varying degrees of judicial autonomy in virtually all European jurisdictions. Although lacking geographic sovereignty, Jews constituted an *imperium in imperio* and their legal system was recognized by their countries of domicile. As stated by Israeli Supreme Court Justice Menachem Elon:

> In addition to its religious character, Jewish Law was also the national law of the Jewish people, because the entire chain of its evolution was the creative invention of that people. In this regard, Jewish Law differs from other religious legal systems, such as Canon Law or Moslem Law, which were not fashioned and developed by any single people but by the believers, Catholic or Moslem, among different peoples. Throughout its diaspora the Jewish people has regarded Jewish Law as its national law, the characteristic and essential part of its cultural possessions as a people and a nation.

Elon, The Sources and Nature of Jewish Law and Its Application in the State of Israel, 2 Israel L. Rev. 515, 518 (1967). Jewish law must be deemed, of necessity, to have been the national law of the Jews during the Nazi period. Jews had no option but to govern themselves by means of their own laws and their own communal institutions: the only alternative was lawlessness and anarchy.

In Skornik v. Skornik, 8 *Piskei Din shel Bet ha-Mishpat ha-Elyon* 141 (1954), Mr. Justice Agranot expressly affirmed that Jewish law should be accorded due standing by the secular courts of the State of Israel, a common law jurisdiction, on the basis of comity. The question addressed in that case was the validity of a marriage celebrated according to Jewish rites but which was not recognized in the country in which the marriage took place. Justice Agranot held that

> with regard to a situation such as presented by counsel for the appellant in his stated question . . . for the limited purpose of giving validity to such a marriage, it is proper to defer to the foreign national law (lex patriae) of the parties at the time of their marriage, which only recognizes marriages celebrated in a special civil form, the other national law which the parties then had and which has continued to be their law up to the present, that is Jewish law.

Id. at 178. In explaining why this is so, Justice Agranot said:

> It is almost superfluous to explain today—what must now be plain to all—that the Jews, even after they were exiled from their country, never became, in their own eyes, a religious sect. According to their own assessment, they never ceased to be a nation whose place is among the other nations of the world. The absence [of the nation] from its own country, to which its sons continued to be faithful, was temporary and [the nation] carried with it, through all its wanderings and during all periods of its exile, the enduring treasure of its culture and its national possessions; Jewish law is among those possessions.
>
> However, during the long period in which the Jews were compelled, in the lands of their dispersion, to confine themselves within the walls of the ghetto, Jewish law assumed more and more of a religious form. But at no time did it cease for

by which the parties felt bound.[6] The *halakhic* issues, therefore, are

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> this reason to be the national law of the Jews even after that wall had been breached and [the Jews] entered the broader world. . . .
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> . . . .
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> . . .[T]he very moment that we admit—as we are obliged to admit—the continued existence of the Jews, in all generations and in all the lands of their dispersion, as a separate people, we must test the nature of Jewish law by the historic relationship of the Jewish people to this law. We are then compelled to conclude that the Jewish people indeed treated Jewish law throughout their historical epochs and throughout their dispersion as their unique property, as part of the enduring treasure of their culture. That is to say that this law served in the past as the national law of the Jews, and even today it bears this national character with regard to Jews wherever they may be.

Id. at 176-77.

The cogency of the application of this principle is exemplified by the following case: A man and a woman desire to enter into a matrimonial relationship. They are domiciled in a jurisdiction that regards all marriage ceremonies as null and void unless celebrated pursuant to the issuance of a marriage license by the appropriate government official. The area is under Nazi occupation and all Jewish inhabitants have been consigned to crematoria. The bride and groom are Jewish and have escaped deportation by going into hiding. For them to declare their identity in securing a marriage license would be tantamount to a self-pronounced sentence of death. They do, however, seek out an officiant well versed in Jewish law and scrupulously adhere to all aspects of relevant Jewish law governing the solemnization of marriage. Assuredly, the parties desire their actions to be governed by law—the *only* system of law by which they could comport themselves—by Jewish law. Comity should accord the parties the protection and benefit of that corpus of law. This was clearly recognized and enunciated by Justice Agranot in *Skornik*. The factual situation pertaining to the transfer of books by the *Hochschule* to Professor Guttmann is entirely analogous and Jewish law should apply for precisely the same reasons.

[6] "The transfer of an interest in chattel is subject to the law of the situs of the tangible personalty . . . *in the absence of an indication by the parties that another law is to govern.*" Rosenbaum v. Consolidated Prods. Co., 81 N.Y.S. 2d 571, 572 (Sup. Ct. 1948) (emphasis added) (citations omitted), aff'd, 276 A.D. 1069, 96 N.Y.S.2d 490 (1950). Since such a transfer was illegal under German law, it is impossible to assume that Guttmann and Veit Simon wanted German law to apply to the transfer of property. Since unwillingness to abide by the offensive and discriminatory laws of Nazi Germany should certainly not be construed as refusing to be bound by any system of law, it is a cogent inference that Jewish law, the only law relevant to the parties, was meant to apply.

It is indeed the case that the parties were Reform Jews associated with a Reform academic institution and that the Reform movement has rejected the binding authority of Jewish law. However, Reform rejection of Jewish law is limited to such law as it pertains to matters of ritual and religious observance. The ethical and moral teachings of Judaism are resolutely affirmed by adherents of the Reform movement. See K. Kohler, Jewish Theology 46 & ch. LIX (1928). Jewish law governing matters of jurisprudence reflects those ethical and moral principles. This has been explicitly affirmed by exponents of Reform Judaism as evidenced by the statement of a noted Reform scholar who wrote: "The moral law is inscribed on practically every page of rabbinical civil . . . law." S. Passamaneck, A Motion for Discovery 14 (1977). Although Reform Jews are likely to adjudicate commercial and personal disputes in civil courts, they do so not because of their rejection of applicable Jewish law, but because, according to their interpretation, the talmudic dictum, "The law of the land is the law," (*Nedarim* 28a; *Gittin* 10b; *Baba Kamma* 113a; *Baba Batra* 54b) bestows precedence upon the civil law and judiciary established by the sovereign authority. All would concede that this is manifestly not the case with regard to the odious laws of the Third Reich. Jews during the Nazi era were effectively denied access to and relief from the German courts. See supra note 4.

relevant to the judicial resolution of controversies concerning the ownership of books rescued from the Nazis during the Holocaust era, and an analysis of the issues presented in the *Sotheby* case is of practical legal interest.

In an affidavit submitted to the Court,[7] Professor Guttmann contends that in the spring of 1939, shortly after having been invited to teach at Hebrew Union College in Cincinnati, he was asked to meet with Dr. Heinrich Veit Simon, a prominent attorney and the president of the *Kuratorium*, or Board of Governors, of the *Hochschule*. At this meeting, Veit Simon, knowing that Guttmann was about to leave Germany with his wife and son, sought to ascertain whether Guttmann would risk taking some of the rare books and manuscripts belonging to the *Hochschule* library out of Germany. Both Veit Simon and Guttmann knew that Jews were prohibited from leaving Germany with valuables or with items of antiquarian interest and that, if caught, the punishment would be imprisonment in a concentration camp or immediate death. Guttmann alleges that, precisely because of the enormous risks involved in undertaking such a venture, Veit Simon proposed to Guttmann that if he succeeded in removing the books and manuscripts from the country, those items would become his personal property. Guttmann reports that, initially, he was reluctant to accept the offer. However, Veit Simon persisted and, after consulting with his wife, Guttman agreed to smuggle the books out of Germany. For his own safety, as well as that of Veit Simon, it was agreed that the matter would be conducted in the utmost secrecy.

Veit Simon then instructed the Secretary and Chief Administrative Officer of the *Hochschule*, Hans Erich Fabian, and the Librarian, Jenny Wilde, to unlock certain bookcases so that Guttmann could select and remove the books and manuscripts in question from the bookshelves. Fearing, however, that the Gestapo might find the valuable books in his home, Guttmann temporarily hid them under some refuse in a basement shed.

In accordance with Gestapo requirements, the Guttmanns were obliged to prepare a list of those possessions which they planned to take out of the country and to submit the list to the Gestapo for approval. This was done to ensure that Jews took no items of value with them when they fled Germany. Knowing full well that the books would not be approved and that their inclusion on any list submitted

[7] Professor Guttmann's narration of the circumstances surrounding his acquisition of the disputed books and manuscripts herein presented is culled from Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 9-16, Abrams v. Sotheby Parke-Bernet, No. 42255/84 (N.Y. Sup. Ct. Aug. 24, 1984).

to the Gestapo would jeopardize both his and Veit Simon's lives, Guttmann did not include them on the required list. He did, however, list a large number of unexceptional books from his personal library. After this list was approved, Gestapo agents came to the Guttmans' home to supervise the packing of all their belongings and to make certain that only approved items would be removed. Working in Guttmann's study, the Gestapo checked the dates of publication of the various books being packed.

The packing of the books and other belongings could not be completed in a single day. At the end of the day, the Gestapo sealed the two doors of the study so that no one might reenter the room after they left for the purpose of adding or substituting items for those already packed. There was, however, a window-door which opened onto a small terrace. The Gestapo left the door unsealed because it was locked and appeared to offer no access from outside. Unknown to the Gestapo, the terrace onto which the door opened extended to a small adjoining bedroom. Guttmann had a key to the window-door and, after the Gestapo left, he climbed through the bedroom window onto the terrace, entered his study through the unsealed window-door carrying the books and manuscripts that had been hidden in the basement and replaced his own books with the rare books and manuscripts removed from the *Hochschule* library. Guttmann made certain that everything was packed as before and, in order not to leave evidence of the exchange, he painstakingly duplicated the knots tied around the books.

After making the exchange, Professor Guttmann hid the previously packed books in the shed where the rare books had been stored. The packing was completed the following day, and the books and manuscripts, together with all of the Guttmanns' other belongings, were put into two five-meter lift vans that were sealed by the Gestapo and shipped to Bremen where the ship on which they expected to sail to America was docked.

The Guttmanns' anticipated nonquota visa was unexpectedly delayed by consular officials for almost a year. Meanwhile, war broke out in Europe and they could not take a German ship to the United States as planned. Instead, they had to travel via a neutral country and on a ship requiring payment in American dollars. Unable to borrow sufficient funds to take all their belongings with them, they had to consolidate their possessions into a single three-meter lift van.

Motivated principally by concern for the books and manuscripts, the Guttmanns left their baby with another family and went to Bremen to repack their belongings. In Bremen, however, they again

had to operate under the watchful eyes of the Gestapo. Carefully, they discarded some items and repacked others, including the books and manuscripts. The Gestapo then spot-checked the items that had been repacked. In Professor Guttmann's own words, it was only "through the grace of God" that the packages containing the books and manuscripts were not inspected, and he was able to take them with him to the United States. Fortunately, the Guttmanns were saved from tragedy; the day after they returned to Berlin and reclaimed their son, the entire family with whom the child had been staying was arrested by the Gestapo.

For the next forty-five years, the books and manuscripts remained in Cincinnati, where the Guttmanns still live and where Guttmann taught at Hebrew Union College. At the age of eighty-one, Guttmann, a man of little wealth, facing increasing medical costs, and wishing to leave his children a legacy, decided that the time had come to sell the books and manuscripts. Accordingly, he arranged for the Sotheby sale, the details of which have become public knowledge.

As noted, this incident has reawakened interest in the much broader question of the *halakhic* perspective concerning ownership of those books and religious artifacts seized by the Nazis during World War II that subsequently fell into Jewish hands as well as ownership of such items which had been concealed from the Nazis and were subsequently found by persons other than the original owners.

I. Vesting of Title in Persons Seized of the Property

The *Gemara*, *Gittin* 45b, states that it is proper to purchase sacred books from a non-Jew at a price which reflects their fair market value so that they will not be desecrated or treated with disrespect. However, the *Mishnah*, *Gittin* 45a, declares that one should not pay an inflated price, lest non-Jews be prompted to seek out such items for theft in the anticipation that Jews will ransom them for extravagant sums. The sole question is whether one who purchases those items from the thief acquires valid title or whether one is obligated to restore the stolen property to its original owner.[8]

There are a number of *halakhic* considerations, each of which may arguably constitute sufficient grounds for title to be regarded as vested in those persons who are in actual possession of the books in question. Each of those considerations warrants separate analysis.

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[8] R. Ya'akov Breisch reports his impression that at some unspecified time, the Polish rabbinate issued a proclamation or ban prohibiting the purchase of books "from the land of bloodshed" but expressed doubt as to the continued binding force of that edict. 1 Y. Breisch, *Teshuvot Ḥelkat Ya'akov*, No. 136.

A. Yi'ush *and a Successor in Due Course*

According to the law as formulated in the Talmud, the general rule is that one who receives stolen property may convey valid title to a successor in due course provided that the victim of the theft has experienced *yi'ush*, that is, he has despaired of recovery.[9] Whether or not *yi'ush* has occurred is ascertained either on the basis of the victim's overt statements or is determined constructively by operation of law.

A purchaser of stolen property who is legally bound to return the purchased item to its rightful owner is ordinarily entitled to recover the purchase price paid for the item as well as any attendant expenses. This claim is vested in the purchaser by virtue of rabbinic enactment.[10] Since the purpose of this legislation is to protect the innocent purchaser, some authorities maintain that the purchaser has no claim for reimbursement if the property was acquired from a notorious thief.[11]

The rule regarding sacred books is somewhat different. Since, as stated earlier, there is a duty to ransom sacred books from a non-Jewish thief in order to prevent acts of sacrilege or disrespect, provided that they may be acquired at fair market value or less, and, moreover, since the purchaser is duty-bound to buy such items even from a notorious thief, the purchaser has recourse against the rightful owner for reimbursement of any expenses incurred to the extent of fair market value even if the books have been acquired from a notorious thief.[12]

As noted above, title is vested in the purchaser only subsequent to *yi'ush* on the part of the victim of the theft. *Shulḥan Arukh, Ḥoshen Mishpat* 361:3, and a number of leading authorities[13] rule that in cases of robbery (as distinct from theft), and absent evidence to the

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9 There is a controversy among early authorities with regard to whether a successor in due course acquires title only if *yi'ush* occurs before he comes into possession of the stolen goods or whether his possession ripens into title even if *yi'ush* occurs subsequent to his having come into possession of the chattel. This controversy is reflected in a dispute between *Shulḥan Arukh* and Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 353:3.

10 See *Baba Kamma* 115a; *Shulḥan Arukh, Ḥoshen Mishpat* 356:2.

11 *Baba Kamma* 116a; *Shulḥan Arukh, Ḥoshen Mishpat* 356:2. See Rema, *Shulḥan Arukh Ḥoshen Mishpat* 356:3, who rules in accordance with the authorities who maintain that a purchaser from a notorious thief is entitled to reimbursement unless he had knowledge of the fact that the purchased chattel was stolen. Rema further declares that all agree that a purchaser from a notorious thief is entitled to reimbursement upon his declaration that he acted solely in order to protect the interests of the rightful owner.

12 See *Hagahot Asheri, Baba Kamma* 6:7; *Ketsot ha-Ḥoshen* 356:3.

13 See *Sema, Shulḥan Arukh, Ḥoshen Mishpat* 361:4; *Shakh, Shulḥan Arukh, Ḥoshen Mishpat* 356:2; *Bet Shmu'el, Shulḥan Arukh, Even ha-Ezer* 28:1.

contrary, *yi'ush* is not deemed to have occurred because the victim anticipates that he will recover his property by instituting proceedings in a court of law. However, the renowned rabbinic decisor, R. Ezekiel Landau, draws the logical conclusion in ruling that *yi'ush* is deemed to have occurred when legal remedies are unavailable for lack of judicial enforcement.[14] Ostensibly, this is the case when soldiers engage in acts of looting in occupied territory.

Nevertheless, even under such circumstances, *yi'ush* may not occur with regard to books printed in the Hebrew language for a different reason. *Tosafot, Baba Kamma* 114b, rules that a victim of theft does not ordinarily despair of the loss of books printed in Hebrew. This principle is codified as normative *halakhah* by Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 236:8. The identical principle is recorded by Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 259:3, with regard to lost property. Title to lost property may be acquired by the finder only if there is reason to assume that the loser has despaired of its return. With regard to Hebrew books, the presumption is that the original owner does not abandon hope of recovery because, realizing that such items are of no use to non-Jews, he anticipates that they will be sold to a Jew who will endeavor to restore them to their rightful owners.

The question of whether it is proper to purchase books which have been plundered by marauding soldiers was first addressed by R. Meir Arak, author of the responsa collection *Imrei Yosher*, in conjunction with incidents occurring during World War I.[15] In light of the foregoing discussion it might be assumed that, absent *yi'ush*, a person acquiring Hebrew books from marauding soldiers would be required to restore them to their original owners. Nevertheless, in the case brought to his attention, *Imrei Yosher* ruled that the purchaser acquired valid title. It was reported to *Imrei Yosher* that Russian soldiers did not seize books for the purpose of realizing their value by means of sale. Rather, it appears that, at the time, paper of every kind was scarce and books were seized by the looting soldiers because their paper could be used as scrap. Accordingly, *Imrei Yosher* ruled that if, in the majority of cases, stolen books were converted into scrap or were seized simply for purposes of wanton destruction, *yi'ush* is to be construed. This ruling is based upon the principle that a person is presumed to despair, or not to despair, of the ultimate return of his stolen property depending upon the usual fate of such items under similar circumstances.

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[14] E. Landau, *Teshuvot Noda bi-Yehudah, Mahadura Tinyana, Even ha-Ezer*, No. 77. See also 2 M. Arak, *Teshuvot Imrei Yosher*, No. 59.

[15] 2 M. Arak, supra note 14.

The application of these principles to the circumstances that prevailed during World War II is the subject of controversy among contemporary writers. R. Pinchas Teitz applies the general rule concerning books printed in Hebrew and argues that *yi'ush* is not to be presumed with regard to Hebrew books seized by the Nazis.[16] An opposing view is espoused by R. Yitzchak Meir Rappaport[17] and by R. Isaac Liebes.[18] The latter position is predicated upon a number of considerations:

(i) Rabbi Rappaport declares that it was well-known that the Nazis "destroyed and burned all Jewish books"[19] and hence *yi'ush* must be presumed. In a similar vein, R. Ephraim Oshry, states that "everyone knows" that the Germans seized books "to make paper" and therefore "the owners certainly dispair" of ever recovering their books.[20] R. Ya'akov Breisch also states *en passant*: "We know what was done to sacred books in the . . . lands of bloodshed, [viz.,] that they were publicly burned with great ignominy."[21]

These statements are, of course, not entirely correct. Quite to the contrary, it is known that the Germans took pains to preserve certain libraries containing rare books and manuscripts with the intention of housing them together with Torah coverings, ark tapestries, and other religious articles in the various synagogues in Prague which were to constitute a museum containing relics of a vanished people. R. Yeḥi'el Ya'akov Weinberg, who prior to World War II served as rector of the Rabbinical Seminary of Berlin (popularly known as the Hildesheimer Seminary), reported that the Nazis preserved the books seized from libraries and added that "as is known, our library survived in its entirety and it reposes in Prague."[22] Indeed, Rabbi Oshry himself reported that, in Kovno, the Germans transferred rare books to a library established by a certain collaborator named Rosenberg.[23] To be sure, the Germans did not behave in a uniform manner. It is quite likely that in some occupied areas they destroyed such books indiscriminately. Whether *yi'ush* is to be presumed would then turn

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16 Teitz, *Be-Inyan Sefarim ha-Ba'im me-Artsot ha-Damim*, 28 *Ha-Pardes* 5 (Kislev 5711).

17 Rappaport, *Sefarim she-Nitslu min ha-Shmad*, *Ha-Ma'or* 4 (Adar 5715).

18 1 I. Liebes, *Teshuvot Bet Avi*, No. 157.

19 Rappaport, supra note 17, at 5.

20 2 E. Oshry, *She'elot u-Teshuvot mi-Ma'amakim*, No. 8.

21 1 Y. Breisch, supra note 8.

22 3 Y. Weinberg, *Seridei Esh*, No. 71. The intention to preserve books as part of the holdings of the Central Jewish Museum that the Germans planned to establish in Prague is fully confirmed by historical sources. See L. Altschuler & A. Cohn, The Precious Legacy 10, 35 (1983). A photograph of a room containing books confiscated by the Nazis is reproduced, id. at 35.

23 2 E. Oshry, supra note 20.

upon the known or presumed comportment of the German army at a given time or place.

(ii) Another reason for assuming that, given the circumstances which prevailed during the Holocaust, *yi'ush* must be presumed even with regard to sacred books is advanced by R. Isaac Liebes. Rabbi Liebes reasons that *yi'ush* does not normally occur with regard to stolen sacred books because the only way the thief may profit from such stolen items is by selling them to a Jew. Hence, the victim has no reason to despair of the return of such property. But, argues Rabbi Liebes, this consideration did not apply during World War II because the Nazis were intent upon annihilating the entire Jewish people and it therefore did not enter the mind of any person that the books would again come into the hands of Jews, since "from the day of the creation of the universe there never was a terrible edict such as this—to annihilate, to slay, and to destroy all Israel."[24] The implication is that, under such circumstances, the Nazis would find no Jewish purchasers for the books which they pillaged.

The ascription of such intention to the Nazis is certainly correct. However, the conclusion which Rabbi Liebes draws therefrom is open to challenge. *Yi'ush* is a psychological phenomenon reflecting the victim's mental state and is not predicated upon the actual intent of the perpetrator. Rabbi Liebes does indeed amplify his argument with an assessment of the victims' mental state: "In such a state, if they already despaired of their lives, did they not most certainly [despair] of their property? To whom would it occur to think thoughts of his house or fortune while under the nails of the angel of death, the impure foul oppressor, in the death camps and in the ghettos?"[25] Despite its ringing eloquence, this argument is less than compelling. The diabolical designs of the Nazis are now a matter of historical record. But whether or not they were recognized at the time by the intended victims is an entirely different matter. The historical record indicates that the Germans did everything possible to conceal their malevolent intentions from both the victims and the world at large. Moreover, there is certainly every reason to assume that, even in the darkest hours of the Holocaust, the oppressed victims hoped and prayed for the defeat of the Germans at the hands of the Allies, and hence had reason to anticipate that their property would eventually be reclaimed by them or their heirs.[26] Furthermore, even had the nefarious "final solution" been announced to the intended victims, *yi'ush* would not

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[24] 1 I. Liebes, supra note 18.

[25] Id.

[26] Cf. 1 Y. Weinberg, supra note 22, who comments that the victims of the Nazis never

have ensued. *Yi'ush* is a psychological phenomenon and it is unthinkable that Jews of the Holocaust generation would have been so lacking in faith as to believe that, in violation of His covenant with Israel, God would permit the annihilation of the entire Jewish community. Hence, the unfortunate victims would certainly have clung to the belief that the plundered books would ultimately find their way into Jewish hands. Indeed, that belief has been confirmed by history. Accordingly, there appear to be no grounds for ascribing *yi'ush* to the owners of those books on the basis of Rabbi Liebes' argument.

(iii) A further reason for assuming that *yi'ush* occurred during the Holocaust even with regard to Hebrew books is suggested by the comments of R. Ya'akov Breisch in his *Ḥelkat Ya'akov*, although the argument is not explicitly formulated by him. The upheavals and deportations of World War II created situations in which, arguably, it is to be presumed that the Holocaust victims realized that there was scant chance that a person coming into possession of property stolen from them, despite his best intentions and efforts, would ever be able to locate the rightful owners. At least with regard to privately-owned property it may be argued that, under such circumstances, *yi'ush* must be presumed to have occurred.

B. *Right of Conquest*

Quite apart from the principle of *yi'ush*, which operates to vest title to stolen property in a successor in due course but not in the thief, there exists another principle of Jewish law which, if applicable, would establish that the conquering armies had themselves acquired title to looted property. *Ḥelkat Ya'akov*[27] and Rabbi Teitz[28] both suggest that purchasers of sacred books need not return those items to their original owners because the Nazi conquerors acquired title to the spoils of war by virtue of the "right of conquest" (known in Hebrew as *kibush milḥamah*).

A responsum attributed to Maimonides deals with a virtually identical question.[29] During a period of unrest, synagogues had been looted and Jews had purchased sacred books from the plunderers. Maimonides was asked whether the purchasers had acquired valid title and hence might retain the books as their own, or whether they were obligated to return the stolen property to the original owners.

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abandoned hope that the enemy would be vanquished and that evil would be entirely eradicated.

27 1 Y. Breisch, supra note 8.

28 Teitz, supra note 16, at 8.

29 *Shitah Mekubetset, Baba Metsi'a* 24b.

Maimonides responded that if the looting occurred at "the command of the king" the purchasers might retain the sacred books; otherwise, they were obligated to return the stolen books upon reimbursement of the funds expended in acquiring those items from the plunderers. Maimonides predicated his ruling upon a statement in the *Gemara*, *Avodah Zarah* 52b and 54b, to the effect that even the utensils of the Temple lost their sanctity when the Temple was pillaged by conquerors. *Ḥelkat Ya'akov*, however, maintains that this responsum does not serve as a compelling precedent. *Ḥelkat Ya'akov* contends that since Maimonides' responsum is not cited by subsequent rabbinic authorities, it cannot be deemed authoritative. In addition, both *Ḥelkat Ya'akov* and Rabbi Teitz express perplexity at Maimonides' comparison of the theft of sacred books to the plunder of Temple vessels. They argue that the abrogation of the sanctity inherent in the appurtenances of the Temple is not relevant to the adjudication of property rights which are entirely mundane in nature.

The comments of these scholars notwithstanding, it appears to this writer that Maimonides' position is not only clear but is supported by many other early authorities as well. The *Gemara*, *Gittin* 38a, declares that gentiles acquire title, even against Jews, to property seized in the course of war and that conquest in and of itself serves to establish title. Many commentators, including Rashi, maintain that, at least insofar as the property of Jews is concerned, the *Gemara* does not herein establish a novel mode of acquiring title; rather, title is incidentally acquired in the course of conquest by a quite standard mode, that is, by means of theft accompanied by *yi'ush*.[30] Under such circumstances, a successor in due course acquires valid title through the operation of the law of theft. According to these authorities, the import of the *Gemara*'s statement concerning right of conquest is simply that *yi'ush* may be imputed whenever theft occurs in the context of warfare since, under such circumstances, no redress is available. This analysis of the concept of right of conquest is, however, disputed by Rashba in his commentary, ad locum. Rashba maintains that title is acquired by conquest in and of itself even when it is certain that the conquest is not accompanied by *yi'ush*.

It is readily apparent that the applicability of the right-of-conquest principle regarding legal ownership of Hebrew books seized in the course of war is contingent upon the controversy between Rashi and Rashba. If, as Rashi maintains, title is acquired as a result of conquest only when the seizure is accompanied by *yi'ush*, right of conquest cannot serve to effect alienation of title with regard to Hebrew

[30] See the authorities cited in 1 A. Kahane-Shapiro, *Dvar Avraham*, No. 11, §§ 2, 12.

books since *yi'ush* does not ordinarily occur in conjunction with the theft of books printed in Hebrew. If, however, right of conquest serves to effect transfer of title in and of itself, as Rashba maintains, there is no basis for an exception to that rule with regard to sacred books.

It appears to this writer that, in distinguishing between looting "at the order of the king" and other forms of looting, Maimonides espouses a view identical to that of Rashba in maintaining that right of conquest establishes title, even absent *yi'ush*. In support of this thesis Maimonides cites the rule that conquest can abrogate the sanctity inherent in Temple property. Maimonides' citation of this principle should not be regarded as a mere metaphor. Extinguishment of title vested in the domain of the Temple is a necessary condition of the abrogation of the sanctity inherent in Temple property. Moreover, theft does not serve to extinguish title vested in the Temple domain even if accompanied by conditions ordinarily associated with *yi'ush*. The thrust of Maimonides' point, as it appears to this writer, is that since, with regard to Temple property, ordinary theft even when accompanied by conditions of *yi'ush* does not serve to extinguish title, the fact that "right of conquest" abrogates the sanctity associated with Temple property is evidence that conquest is a novel and independent mode of acquisition and is not merely an instance of acquisition of title by means of theft accompanied by *yi'ush*.

Rashba's thesis regarding the nature of right of conquest is also espoused by R. Shimon ben Zemah Duran.[31] One significant qualification is added by a grandson of Rabbi Duran, R. Abraham ibn Tavah.[32] The latter authority rules that if one purchases a "glass stone" from a non-Jew and resells it to another Jew and it is subsequently discovered that the object is actually a gem, the first purchaser has no recourse against the second because the first purchaser acquired property rights only to glass, not to a precious stone. Similarly, rules Abraham ibn Tavah, when the conqueror intends to use the seized books for scrap paper, he acquires title by virtue of conquest only to the extent of the scrap value of the items seized. Since the proprietary interest acquired by the plunderers is limited to the scrap value of the seized items, interest in any additional value remains vested in the original owner. Accordingly, since a Jew who acquires such books from plunderers cannot acquire better title than was vested in the seller, he must return the books to their original owners upon payment of their scrap value (or upon indemnification

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[31] 2 S. Duran, *Tashbats*, Nos. 126 & 127.

[32] A. Tavah, *Ḥut ha-Meshulash, Tur ha-Shlishi*, No. 24.

for expenses incurred in their purchase, whichever is greater).[33] Nevertheless, as pointed out by Rabbi Oshry, it seems obvious that if, as was at least sometimes the case during World War II, the looters, recognizing that books are inherently valuable (even if they did not know the full extent of their value), intended to preserve them rather than destroy them or use them as scrap, the plunderers acquired title to the full extent of their value by virtue of conquest and hence the purchaser need not restore such books to their original owners.[34]

R. Abraham Dov Ber Kahane-Shapiro, the venerable Chief Rabbi of Kovno, in his *Dvar Avraham*, advances a novel thesis with regard to "right of conquest" which yields a somewhat modified application of this principle.[35] He asserts that right of conquest results in the vesting of title in a conqueror, and hence in a successor in due course, only so long as the object in question remains in the possession and control of the conqueror or his successor. The original owner, however, is not entirely divested of ownership but retains a residual title. Accordingly, if the conqueror loses possession and control of the captured property, the property does not become *res nullius*; rather, title is immediately restored to the original owner even without a formal act of acquisition on the latter's part.

Thus, it appears to this writer that, according to *Dvar Avraham*, one who purchased or otherwise acquired sacred books from the Nazis may assert a right of ownership in some limited circumstances but not in others. A sharp distinction must be drawn between the situation in which a person purchased or seized property still in German hands and the situation in which the property was acquired subsequent to the defeat of the Germans. If the purchaser acquired the books from the Germans while they still retained title by virtue of right of conquest, it follows that, according to Rashba, the purchaser is under no obligation to return the plundered items to their original owners. If, however, the purchaser came into possession of the books after the defeat of the Nazis, the situation is entirely different. According to *Dvar Avraham*'s analysis of the principle of right of conquest, the conqueror's title became extinguished upon loss of control and automatically reverted to the original owners prior to acquisition

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[33] This analysis, of course, applies only to situations in which *yi'ush* has not occurred. The earlier-cited responsum of *Imrei Yosher*, supra note 14, establishes that, absent evidence to the contrary, *yi'ush* may be assumed when it is known by the victims that the books are to be used as scrap. Under such circumstances, title is vested in the purchaser by operation of the law of theft.

[34] Contrary to Rabbi Teitz' comments, this conclusion in no way contradicts the ruling of *Tur ha-Meshulash* since it involves a materially different fact pattern.

[35] 1 A. Kahane-Shapiro, supra note 30, § 8.

by the purchaser. Hence the purchaser is obliged to return the items in question to their original owners.

A significant limitation upon the operation of "right of conquest" as a mode of acquisition was enunciated in a 1954 decision of the Rabbinical Court of Jerusalem.[36] The case involved a dispute regarding ownership of a silver Torah crown, originally the property of a private party, a Hungarian Jew. During World War II, Torah ornaments were seized by Hungarian fascists together with all other valuables belonging to Jews. After the war, the Torah crown came into the possession of a communal institution in Jerusalem and was placed on display on Mount Zion. The original owner survived the war and immigrated to Israel. During the course of a visit to Mount Zion, he came upon the Torah crown which he immediately recognized as his property because it was engraved with his parents' names. He was also able to produce a witness, the former sexton of the synagogue in his home community, who had personally delivered the Torah crown to the oppressors. The witness testified that he recognized the artifact and substantiated the plaintiff's claim of prior ownership. The respondent institution did not dispute these facts but contended that it had nevertheless acquired valid title. That claim was based in part upon an assertion that the claimant's title was extinguished by virtue of right of conquest. The court rejected that contention. Pointing to the fact that the silver ornament had been seized by *Hungarian* Nazis rather than by German soldiers, the court asserted that title is acquired by conquest only in the course of war against a foreign country. Since a nation cannot engage in acts of war against its own populace, reasoned the court, it cannot acquire title to the property of its own citizens by virtue of right of conquest. Repressive acts committed by a government or its armies against its own nationals were held to constitute acts of theft and robbery. Hence, the acts of the Hungarian fascists were, in the eyes of the law, indistinguishable from ordinary theft.[37]

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[36] 1 *Piskei Din shel Batei ha-Din ha-Rabbaniyim* 169-73 [hereinafter *Piskei Din*]. Among the members of the court were the noted scholars R. Joseph Eliashiv and the late R. Betzalel Zolti.

[37] This analysis of the principle of right of conquest serves to illuminate the cryptic comments of R. Israel Isserlein. See I. Isserlein, *Terumat ha-Deshen, Pesakim u-Ketabim*, No. 69. A question was submitted to Rabbi Isserlein concerning "books from Dresden" which had been seized by non-Jews under unexplained circumstances and which were subsequently purchased by Jews. *Terumat ha-Deshen* remarks that, under similar circumstances, his predecessors declined to rule unequivocally in favor of the purchasers. He reports that at an earlier time a similar question arose with regard to purchasers of books from countries when "they took books by theft just as they took other property by way of theft." Earlier authorities had refused to rule that the rights of the heirs of the original owners had been extinguished.

The same distinction would apply to property seized by the Germans as well. *Mutatis mutandis*, no claim of title to property of German Jews seized in Germany by the Nazis could be advanced under the principle of right of conquest. Although such a claim would be cogent with regard to the property of Jews seized by the Germans in other countries, no such claim could be entertained regarding property originally belonging to German Jews with whom Germany was technically not at war.[38]

It is self-evident that a claim of title, predicated upon the right of conquest, can be entertained only regarding property that actually came into the possession of the Nazis but not regarding property seized in order to prevent it from falling into their hands. A claim of title to property seized in order to prevent its appropriation by the Nazis must be predicated upon entirely different principles of law.

Hence, *Terumat ha-Deshen* declined to offer an advisory opinion but stated that if the litigants were to appear before him he would reflect further on the matter before reaching a decision.

Terumat ha-Deshen's comments are puzzling. He clearly did not deem *yi'ush* to have occurred since he speaks of the books as objects of theft that must be returned as a matter of law. Nevertheless, even in the absence of *yi'ush*, he was willing to take the purchaser's claim of title under advisement. Moreover, even had *yi'ush* occurred, the successors in due course would have been obligated to restore the books on principles of equity. See section II of this article. If, however, it is posited that the books were seized as an act of war, *Terumat ha-Deshen*'s position can be explained in one of four possible ways:

(1) *Terumat ha-Deshen* may be understood as agreeing with the view attributed to *Shakh* to the effect that spoils of war need not be returned to the original owner on the basis of equity. Assuming, as is indeed evident from his comments, that *yi'ush* did not occur, *Terumat ha-Deshen*'s doubt may then have been whether right of conquest secures title even in the absence of *yi'ush*, as is the opinion of Rashba, or whether right of conquest is efficacious only when coupled with *yi'ush*.

(2) Alternatively, *Terumat ha-Deshen* may have been fully in accord with the opinion of Rashba in maintaining that right of conquest is effective even in the absence of *yi'ush* but was unsure of whether the principles of equity posited by Jewish law apply to spoils of war as later announced by *Ketsot ha-Ḥoshen* or whether they are not applicable as *Shakh* maintained.

(3) *Terumat ha-Deshen* may have accepted the position of *Shakh* that equitable principles are limited to restoration of lost property but was in doubt as to whether the rabbinic decree concerning the return of stolen goods extends to spoils of war, as was maintained by the Rabbinical Court of Jerusalem, or whether the rabbinic decree applies to all seized property without exception.

(4) It may be the case that the books in question were seized as an act of the host government against Jewish nationals. If so, *Terumat ha-Deshen*'s indecision may have involved precisely the novel point identified by the Rabbinical Court of Jerusalem, viz., whether the principle of right of conquest is operative with regard to actions of a government against its own nationals.

38 Nor can it be argued that, upon defeat of the Germans and seizure of Nazi-occupied territory by the allied forces, title became vested in the Allies—and hence in their successors—by virtue of the right of conquest since it is clear that the liberators did not seek to acquire title to booty previously seized by the enemy. On the contrary, the conquering powers made every effort to identify the rightful owners and to restore their plundered property. See 3 Y. Weinberg, supra note 22; 2 *Piskei Din*, supra note 36, at 171-72.

C. Zuto Shel Yam

Yet another, and perhaps more basic, argument can be made for assigning valid title to sacred books to individuals who took possession of such property during the Holocaust in order to prevent those items from falling into the hands of the Nazis. The *Gemara*, *Baba Metsi'a* 22b, states:

> Whence [do we learn] that an article lost through the flooding of a river may be retained [by the finder]? It is written, "And so shall you do with his ass; and so shall you do with his garment; and so shall you do with every lost thing of thy brother's, which he has lost and you have found" (Deuteronomy 22:3) [which means to say that only] if the object has been lost to him and may be found by any person [has it to be returned to him, and it follows that] a case like this is exempt [from the biblical law] since it is lost to him and cannot be found by any person.

On the basis of the principle that chattel "lost to all persons," that is, property facing imminent distruction, *ipso facto* becomes *res nullius*, the *Gemara*, *Baba Metsi'a* 21b, declares that if a lost article is found in the intertidal space of the seashore (*zuto shel yam*) or on ground that is flooded by a river, the finder need not return the article even if it bears an identification mark.

This *zuto shel yam* principle, however, may not be applicable to cases involving ownership of property acquired in time of war for a number of reasons:

(i) As Rabbi Teitz points out, the relevance of the *zuto shel yam* argument with regard to World War II circumstances would obviously depend upon varying local conditions.[39] In some places, and at some times, it was known that the Nazis were intent upon destroying sacred books. In other places, and at other times, it was known that they wanted to preserve rare books and valuable artifacts for their own purposes.

(ii) Moreover, it is not entirely clear that destruction wrought by pillaging armies is comparable to a *zuto shel yam* situation. In the matter brought to the attention of *Imrei Yosher*, the interlocutor argued that one who purchases Hebrew books subsequent to their seizure by marauding soldiers acquires valid title on the basis of the principle of *zuto shel yam*. Since the soldiers were about to destroy the books by reducing them to scrap paper, one who succeeds in purchasing the books from them has, in effect, rescued the books from the "intertidal space of the seashore" (*zuto shel yam*). In rescuing

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[39] Teitz, supra note 16, at 6.

property destined for imminent destruction, the purchaser acquires valid title on his own behalf. *Imrei Yosher* dismisses that contention as applied to the situation brought to his attention with a cryptic statement: "The soldiers intended to cut them [but] since they had not as yet done [so] it is not comparable to *zuto shel yam*."[40] *Imrei Yosher* apparently distinguishes between a natural disaster and an act requiring human volition. Since nature is governed by unvarying causal principles, an object about to be destroyed by a natural phenomenon and which cannot be rescued by its owner is, for all intents and purposes, already destroyed insofar as the proprietor is concerned. However, when the object is in danger of destruction at the hands of a human agent, its fate is not assured since the malefactor may undergo a change of heart. Hence, since destruction of the property is not already entailed as a matter of causal necessity, the owner's proprietary interest does not become extinguished.[41]

(iii) The *zuto shel yam* argument can be cogently raised only in situations in which the property was spirited away by the claimant in order to prevent it from falling into the hands of the Germans or when the item had been seized from the Germans and the effect was to prevent its imminent destruction. This consideration does not apply in cases in which such items were hidden from the Germans by their owners and, having been spared thereby from discovery and destruction, were found intact after the war. Of course, the argument based upon the general rule that *yi'ush* serves to enable a successor in due course to acquire title applies even under such circumstances provided, however, that *yi'ush* has indeed occurred.

(iv) The *zuto shel yam* argument may not apply in circumstances in which the books were prevented from falling into the hands of the Nazis by non-Jews and were subsequently acquired by Jews. Mordekhai, *Baba Metsi'a*, section 257, rules that a Jew cannot acquire title to property rescued from a sinking ship by virtue of purchase

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[40] 2 M. Arak, supra note 14.

[41] The limitation placed by *Imrei Yosher* upon application of the principle of *zuto shel yam* is somewhat problematic. The talmudic foundation of this principle appears in both *Baba Metsi'a* 24a and *Avodah Zarah* 43a. Although such reference is absent in *Baba Metsi'a* 24a, the *Gemara, Avodah Zarah* 43a, discusses the rescue of property from armed legions and applies the same rule that governs the case of *zuto shel yam*. A similar rule is codified in *Shulḥan Arukh, Ḥoshen Mishpat* 181:1. Perhaps *Imrei Yosher* distinguished between situations in which the soldiers have actually begun to engage in wanton acts of destruction and situations in which they have merely seized booty with the intention of destroying their spoils but have not actually commenced acts of destruction. If so, *Imrei Yosher* would regard only the former situations in which the intent has already been particularly concretized as being comparable to *zuto shel yam* and would view the rule expressed in *Avodah Zarah* 43a and *Shulḥan Arukh, Ḥoshen Mishpat* 181:1 as limited to situations of such nature.

from a non-Jewish rescuer since, under applicable civil law as reported by Mordekhai, the non-Jew is obligated to restore the property to its original owner.[42]

Mordekhai's ruling appears to be predicated upon this line of reasoning: An object located in *zuto shel yam* becomes abandoned property only when it cannot be rescued by the owner himself. Under such circumstances, the object is regarded as if it had already been destroyed. The presence of a potential rescuer does not serve to preserve the property rights of the original owner because when property is about to be lost "to all men," a bystander is not obligated to act on behalf of the proprietor. The case is significantly altered upon the intervention of a non-Jewish rescuer who is bound, by virtue of applicable provisions of civil law, to restore the property to its original

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[42] Contemporary maritime law recognizes a right of salvage in an endangered or derelict vessel and its cargo. The salvors are entitled to an award allowing them liberal compensation for their services rather than an award based simply upon quantum meruit. The amount of salvage compensation is in the discretion of the court. The amount of the award depends upon consideration of all the circumstances of each case and varies with the danger and difficulty of the salvage operation and the value of the property rescued. See 1 M. Morris, The Law of Seamen 269-71, 351-54 (4th ed. 1985). Medieval German law was, in some circumstances, even more favorable to the salvor. Founding itself upon the notion of "rightlessness" or outlawing of aliens, medieval law established the rule that, when a ship that became stranded on the sea coast or in a river touched land, the dwellers on the shore had a so-called "strandage right" (*Strandrecht*) or, in the case of rivers, a "groundage right" (*Grundrutecht*), i.e., the right to appropriate the stranded chattel. Originally, this rule included the right to enslave any shipwrecked person.

This is, of course, at variance with the German "law of the land" reported by Mordekhai. The law applied in Germany during the lifetime of Mordekhai (1240(?)-1298) is somewhat unclear. At an early date, it was recognized that these provisions of maritime law served to restrain commerce. Accordingly, in 1220, Emperor Frederick II enacted a statute abrogating the rights of strandage or groundage. This edict was ignored by the Territorial rulers who regarded the seashore as their property and who continued to claim all wreckage washed upon the shore. However, the right of groundage did disappear at an early date on rivers other than the Rhine and the Main. In particular, the commercial cities sought to prevent the exercise of the right of wreck by the Territorial rulers and, in at least one incident which occurred in 1485, caused a Territorial bailiff who seized the goods of a stranded vessel to be hanged as a robber. In cities located on the banks of the Rhine and the Main and on the seacoast there occurred constant and violent disputes between the Territorial princes and the coast or riparian dwellers. See R. Huebner, A History of German Private Law 432 (F. Philbrick trans. 1968).

Mordekhai was a disciple of Maharam of Rothenberg. Rothenberg is located near the Tauber River. There is some evidence that Mordekhai later lived in Goslar which is located between the Mittellandkanal and the Elbe River. Later, he resided in Nurenberg near the Pegnitz. See 12 Encyclopedia Judaica 311-14 (1972); Rand McNally Atlas 30 (1979). It is unlikely that Mordekhai regarded the edict of Frederick II as binding in light of its rejection by local authorities. However, since he did reside in the vicinity of the Rhine or the Main, it is entirely possible that groundage had already disappeared in the locale in which Mordekhai lived at the time that he issued his ruling. It is noteworthy that Mordekhai refers to a "river" rather than to a sea. It is certainly possible that, in order to facilitate trade, the municipalities of the area in which Mordekhai found himself had enacted legislation abrogating groundage and requiring the return of shipwrecked chattel to the original owner.

owner. Under such circumstances, the presence and action of the non-Jew effectively serves to assure that the property does not in fact face "imminent destruction." Nor, since the owner assumes that the non-Jew will discharge his legal obligations, is there reason for *yi'ush* to occur.[43]

II. OBLIGATIONS "BEYOND THE BOUNDARY OF THE LAW"

In the final analysis, none of the foregoing arguments may be dispositive. Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 259:7, 356:7 and 368:1, rules that both lost and stolen property must be returned to the original owner by a successor in due course, even though *yi'ush* has occurred, and even if the property in question has been rescued from imminent destruction. The obligation to restore lost or stolen property even under such conditions is in the nature of an obligation "beyond the boundary of the law" (known as *lifnim mi-shurat ha-din*). Such obligations are duties imposed by considerations of equity rather than by virtue of statutory law.[44] Nevertheless, obligations of this na-

[43] Mordekhai's ruling is normatively recorded by Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 259:7. However, Rema's citation of Mordekhai's ruling is somewhat imprecise. In context, Rema's comments give the impression that the Jewish purchaser must return the property to the original owner because of the considerations of civil law. Mordekhai, however, is careful to state that it was not the Jewish purchaser who had rescued the property. The clear implication is that under the stated circumstances, the purchaser is obligated to restore the property by virtue of Jewish law irrespective of civil law considerations. Mordekhai is quite obviously asserting that the civil law provisions as they apply to non-Jews affect the *zuto shel yam* status of such property. With regard to whether or not a Jew would be bound by civil law under such circumstances, see Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 259:7 and 356:7 as well as *Shakh, Shulḥan Arukh, Ḥoshen Mishpat* 356:10.

[44] Reflected in the parallel provisions of *din* and *lifnim mi-shurat ha-din* are principles roughly equivalent to the common law concepts of law and equity. In instances of *yi'ush, zuto shel yam,* or *kibush milḥamah,* title becomes extinguished by operation of law but the original owner may still recover his property on the basis of considerations of equity. In early common law, actions in law and actions in equity were brought before different judicial bodies and were adjudicated in accordance with somewhat different principles. Although Jewish law never provided for separate tribunals, it contains a number of distinctions between adjudication on the basis of law and adjudication on the basis of equity. For example, as noted earlier, Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 259:3, states that when return of lost property is commanded by equity, but not by law, a poor man cannot be compelled to restore lost property to a wealthy individual.

Insofar as lost or stolen property is concerned another distinction arises. An award of chattel to the original owner by operation of law is, in effect, a decision that the title always remained vested in the original owner. The judicial verdict is merely a determination that the title vested in the original owner was never extinguished. On the other hand, an order commanding return of property on the basis of considerations of equity recognizes that title has indeed passed to the purchaser or finder but demands that such title be transferred back to the original owner. However, until that is actually accomplished, title remains in the hands of the finder or purchaser. For that reason, concludes Rabbi Teitz, one who is bound to return sacred books to their original owner by reason of an obligation which is "beyond the boundary of

ture are regarded by the *Gemara, Baba Metsi'a* 30b, as binding by virtue of biblical law. Elsewhere, the *Gemara, Baba Metsi'a* 16b and 108a, predicates certain similar obligations upon the verse, "And you shall do what is right and good in the eyes of the Lord" (Deuteronomy 6:18). *Shakh, Shulḥan Arukh, Ḥoshen Mishpat* 259:3, states that despite its extralegal nature, fulfillment of this obligation with regard to the restoration of lost or stolen property may be compelled by the court.

There is some question with regard to whether there exists a similar obligation to restore the spoils of war to their original owners. Rabbi Teitz assumes that no distinction can be drawn between property acquired by right of conquest and stolen property to which title has been acquired by a successor in due course subsequent to *yi'ush*.[45] However, an entirely different view was expressed in the previously cited decision of the Rabbinical Court of Jerusalem.[46]

Shakh, Shulḥan Arukh, Ḥoshen Mishpat 356:10, distinguishes between the parallel obligations mandating the return of lost and stolen property even when acquired subsequent to *yi'ush*. According to *Shakh*, those obligations are separate and distinct. *Shakh* declares that the obligation devolving upon the purchaser of stolen property to restore it to its rightful owner even though *yi'ush* has occurred is the product of rabbinic legislation, while the parallel obligation regarding lost property is predicated upon the biblical admonition, "And you shall do that which is right and good." In the opinion of *Shakh*, the latter obligation is not all-encompassing and does not mandate the restoration of all involuntarily alienated property to the original owner. Rather, the obligation to act beyond the boundary of the law

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the law" may nevertheless enjoy the use of those volumes until the rightful owner is located. One who is obligated to return such volumes as a matter of law enjoys no such right.

Imrei Yosher permits use of such books by one who is in possession of them on other grounds. *Imrei Yosher* draws attention to the disagreement among halakhic authorities as to whether or not one may temporarily utilize lost property that bears no unique identification mark but that, nevertheless, does not automatically become the property of the finder. He declares that all would agree that a person may make use of plundered sacred books purchased from looters or their successors since "he has paid money and has performed a *mitsvah*." Presumably, the consideration underlying this ruling is that the purchaser is entitled to reimbursement of the funds expended in retrieving the stolen property and retains a lien against such property for satisfaction of that claim. Since it is uncertain that the purchaser will ever be able to restore the property to its rightful owner and recover his expenses, he may, in effect, execute his lien by making use of the books. *Seridei Esh*, however, expresses reservations with regard to this position but nevertheless opines that a scholar who has custody of books belonging to the library of a rabbinical seminary may make use of them pending their return since "the administration of the library certainly would have lent them to him . . . ."

[45] Teitz, supra note 16, at 7.

[46] 1 *Piskei Din*, supra note 36, at 171.

applies only to lost property and requires its return even when *yi'ush* has occurred. Rabbinic law establishes a similar obligation with regard to stolen property. This rabbinic legislation requires a successor in due course to return stolen property to the original owner even though biblical law provides that when *yi'ush* has occurred, title is vested in the successor.

The Rabbinical Court of Jerusalem, however, declared that this rabbinic decree is limited to stolen property in the conventional sense of the term. The Court argued that there is no evidence indicating that the rabbinic decree concerning stolen property was intended to apply to the spoils of war as well.[47] Policy considerations might well warrant a distinction between obligations imposed upon one who receives stolen goods and those imposed upon one who comes into possession of spoils of war. *Shakh*'s position is supported by the fact that Rema refers to the principle of "And you shall do what is right and good" only in *Ḥoshen Mishpat* 259:7 with regard to property threatened by imminent destruction in the form of *zuto shel yam* but fails to refer to this concept in *Ḥoshen Mishpat* 356:7 or 368:1 with regard to the parallel obligation regarding stolen property.

An opposing view is expressed by *Ketsot ha-Ḥoshen*.[48] *Ketsot ha-Ḥoshen* regards the verse, "And you shall do what is right and good," as a general biblical principle mandating restoration of lost and stolen property to the original owner even subsequent to *yi'ush*. As a general principle designed to preserve property owners from undeserved loss, this provision according to *Ketsot ha-Ḥoshen*, applies to spoils of war no less than to ordinary theft.[49]

According to the analysis presented in the decision of the

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[47] Id.

[48] *Ketsot ha-Ḥoshen* 259:3.

[49] The comments of Rashi, *Ḥullin* 89a, tend to indicate that spoils of war should be restored to their original owner by a successor in due course at least on the basis of ethical considerations. The *Gemara* declares, "As a reward for our father Abraham having said, 'I will not take a thread or a shoe-strap' (Genesis 14:23) his descendants were privileged to receive two commandments: the thread of blue [on the fringes of garments] and the strap of the phylacteries." Rashi remarks that Abraham was rewarded in this manner because "he did not wish to benefit from theft." Indeed, the *Gemara* itself subsequently employs the term "theft" in relation to this incident. The term "theft" as applied in this context, certainly cannot be understood in a literal sense. The verse cited by the *Gemara* was uttered by Abraham in declining the offer of the spoils of war proffered by the King of Sodom. Abraham apparently felt constrained to refuse, even though his status was that of a successor in due course, either because principles of equity recognized by the Jewish legal system apply to spoils of war as well as to stolen objects, or because of a general concern to act in accordance with an ethical standard "beyond the boundary of the law." Cf. *Shabbat* 120a which characterizes refusal to profit from another's involuntary abandonment of property in the face of impending fire as an act of piety.

Rabbinical Court of Jerusalem, whether or not property alienated by virtue of right of conquest must be restored to its original owner is a matter of controversy between *Shakh* and *Ketsot ha-Ḥoshen*. Although the dispute was resolved on other grounds, in an *obiter dictum*, the Court declared that the opinion of *Shakh* should be regarded as normative, that is, a successor to property seized in the course of war need not restore such property to the original owners.[50]

Moreover, even according to *Ketsot ha-Ḥoshen*, whose understanding of the principle of "And you shall do what is right and good" requires the return of spoils of war as well, the application of that principle to sacred books is not entirely clear. Equitable considerations do not *always* compel return of lost property when title has become vested in the finder by operation of law. For example, Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 259:5, rules that Jewish law considerations of equity do not mandate the return of such property when the original owner is a wealthy person and the finder is a pauper. Arguably then, were a like situation to occur with regard to books, a poor man would not be required to return them to a wealthy person. Moreover, Rabbi Liebes observes that "with regard to sacred books, all are poor."[51] Presumably, the thrust of that statement is that wealth is of no avail with regard to acquisition or use of books if such books are readily available. Therefore, even a wealthy person who has legitimately acquired title to lost or stolen books is entitled to the same equitable consideration as a poor person if he cannot readily replace the books whose return is demanded. Despite this consideration, Rabbi Liebes opines that the sentimental value attached by private owners to sacred books owned prior to the Holocaust always renders the original owner a "poor man" vis-a-vis his lost sacred books and that, regardless of their relative financial worth, the original owners must always be deemed "poorer" than a successor in due course.[52]

Rabbi Liebes' argument compelling the return of books to Holocaust survivors under all circumstances, based as it is upon considerations of emotional attachment, certainly would not apply when the original owner was a communal institution. Nevertheless, there may

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[50] The Rabbinical Court also noted other distinctions which flow from the controversy between *Shakh* and *Ketsot ha-Ḥoshen*. Duties stemming from equitable principles obligate individuals, but not communal entities. Moreover, as will be noted subsequently, such objections are extinguished if the original owner is wealthy and the finder or successor in due course is poor. In contradistinction, obligations generated by rabbinic edict are universal and binding upon all.

[51] 1 I. Liebes, supra note 18.

[52] Id.

be strong reason to argue that, at least in some situations, considerations of equity should require the return of books to libraries and communal institutions. Despite the dictum, "Nor is the entire community poor," recorded in the Palestinian Talmud, *Gittin* 3:7, the community may well be regarded as "poor" vis-a-vis books and manuscripts which are not readily available to its members. Scholars within the community who are potential users of communally owned rare books are certainly "poorer" than unlettered but prosperous finders.

Curiously, Rabbi Oshry, in his responsum concerning the ownership of books rescued from the Germans during the Holocaust, fails to take note of considerations of equity in Jewish law. He reports that the Germans demanded that the inhabitants of the Kovno ghetto bring their valuables and books to certain designated collection points. A certain Yitzḥak Greenberg collected a number of valuable books and, at considerable risk to his own life, placed them in a container which he proceeded to bury in the ground. After the war, a number of former inhabitants of the ghetto returned to that site and commenced digging for the concealed valuables. In the course of these excavations, the container of books was uncovered. A former ghetto resident who was among the returnees recognized some of the volumes as his own and demanded that the finder of the container restore those books to him.[53]

It is not entirely clear whether Greenberg rescued the volumes in question after they came into Nazi possession or whether he secreted them before they were delivered to the designated collection point. Elsewhere, Rabbi Oshry reports that the books collected from the ghetto residents were delivered to the deputy of Alfred Rosenberg, the German expert on matters of Jewish culture.[54] Since the Germans clearly intended to preserve those volumes, the *zuto shel yam* principle is not at all germane. Accordingly, if the books were acquired by Greenberg before they came into Nazi possession, title would have remained with the original owner (and hence, even subsequent to *yi'ush*, could not pass to the successor in due course, viz., the finder). Since Greenberg certainly had no intention of stealing the books, he became, in effect, a gratuitous bailee when he assumed the obligation of preserving the books on behalf of the original owners. If, however, Greenberg acquired the books subsequent to their seizure by the Nazis, the result might be entirely different. If the books were acquired under circumstances in which theft was followed by *yi'ush* (assuming

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[53] 2 E. Oshry, supra note 20.
[54] 1 id., No. 14.

that during the Holocaust *yi'ush* occurred even with regard to Hebrew books), or if title became vested in the Nazis by right of conquest, Greenberg would have acquired title as a successor in due course. If he had acquired title and subsequently died without heirs, the books would become the property of whoever happened to find them. If, however, Greenberg did not acquire title, the original owner would certainly have a claim against the finder of that property.

Unfortunately, this distinction is not made in Rabbi Oshry's discussion. Perhaps Rabbi Oshry omitted an analysis of the alternative hypothetical because, having been a witness to the events described, he may well have known that, unlikely as it may seem, Greenberg had acquired the books after they had fallen into the possession of the Germans. Consistent with that presumed fact pattern, Rabbi Oshry ruled that the books were the rightful property of the finder. As noted earlier, if it were assumed that Greenberg secreted the books before they came into possession of the Nazis, it is doubtful that the property rights of the original owner ever became extinguished. More significantly, Rabbi Oshry fails to take note of the obligation enunciated by Rema mandating restoration of property to the original owner on the basis of equitable considerations.[55] Thus, the first issue to be adjudicated is whether title to spoils of war vests in the captor even in the absence of *yi'ush*. The second, and more crucial, issue is identical to the issue identified by the Rabbinical Court of Jerusalem: Whether or not obligations based on equitable considerations extend to property seized by virtue of the right of conquest?[56]

Rabbi Rappaport rejects the contention that books preserved during the Holocaust must be returned to the original owners by reason of equity.[57] He advances the curious argument that, since the original owners made no attempt to recover their property, they, in effect, engaged in "intentional *yi'ush*." He further asserts that Rema's ruling obligating the restoration of lost and stolen property as a matter of equity applies only when conventional *yi'ush* has occurred, but is inapplicable in situations involving intentional *yi'ush* which is tantamount to voluntary abandonment of property. When property is intentionally abandoned, there is clearly no obligation to restore such property to its original owner even as a matter of equity.[58]

However, this argument, as applied to the post-Holocaust situation, is rather tenuous. In the vast majority of instances, it is hardly

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[55] Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 259:7, 356:7 and 368:1.

[56] 1 *Piskei Din*, supra note 36, at 171.

[57] Rappaport, supra note 17, at 6.

[58] Id.

the case that refugees voluntarily abandoned their property after the war. In most cases, those individuals either had no opportunity to return to their places of domicile or would have found return to their former homes to have been too onerous an undertaking. Rema's ruling, therefore, seems applicable to the return of property rescued during the Holocaust and recovered during the post-World War II period.[59]

III. PROFESSOR GUTTMANN'S CLAIM

The *halakhic* questions which arise regarding the books in Professor Guttmann's possession are different from the foregoing cases in a number of ways. The Attorney General's action was based upon the contention that the books and manuscripts were given to Guttmann for safekeeping. If that was indeed the case, Guttmann became a bailee and assumed the duty of safeguarding those materials on behalf of their rightful owner and, accordingly, is barred from claiming that he acquired title.

A remarkably similar question was presented to Rabbi Yeḥi'el Ya'akov Weinberg.[60] A faculty member of the Hildesheimer Seminary in Berlin selected a number of volumes from the library of that institution and concealed them from the Nazis. That individual survived the war and, taking those books with him, ultimately settled in Haifa. He then wrote to Rabbi Weinberg, the preeminent rabbinic scholar on the faculty of the Hildesheimer Seminary, and asked whether he might claim title to these books. Since the individual acquired the books before they fell into Nazi hands, the sole basis for the claim was the *zuto shel yam* argument. Rabbi Weinberg responded by saying that, even if the argument were valid, there would nevertheless be an obligation to return the books on the basis of Rema's ruling that such property must be restored because of equitable considerations. Moreover, argued Rabbi Weinberg, the *zuto shel yam* argument is entirely inappropriate in this case. Rabbi Weinberg reasoned that when his interlocutor came into possession of the books, he undoubtedly assumed that hostilities would soon end and that he would then return the books to the Hildesheimer Seminary library. In effect, he had no intention of acquiring title. Rather, he took possession of the books on behalf of their rightful owners and assumed the obligations of a bailee who accepts property for safekeeping. Rabbi Weinberg

[59] It may be noted that R. Yeḥi'el Ya'akov Weinberg peremptorily dismisses Rabbi Rappaport's conclusion as patently erroneous without offering a detailed critique of his position. 3 Y. Weinberg, supra note 22.

[60] See id.

concludes his comments by stating that, in his opinion, it would be entirely proper and appropriate for the surviving directors and members of the faculty of the Seminary to allocate a portion of the rescued volumes to the interlocutor as compensation for his efforts.

The facts in that case are remarkably similar to those in the Sotheby controversy, with the single exception that Guttmann maintains that the books were explicitly given to him as a gift. The controversy surrounding the Sotheby sale similarly involves a situation in which ownership of the books and manuscripts cannot be resolved on the basis of considerations of *yi'ush* or *zuto shel yam*. On the contrary, such a claim is expressly negated both by Guttmann's contention that those items were presented to him as a gift and by the Attorney General's contention that the materials were delivered to Guttmann for safekeeping as a bailment. If the books and manuscripts in question were indeed accepted as a bailment and subsequently smuggled out of Germany by Guttmann on behalf of the original owners, he cannot claim title by virtue of having acquired them on his own behalf on the basis of the *zuto shel yam* principle. Assuredly, a person rescuing such items from a flooding river upon the declaration that he is acting on behalf of the owner of such property could not later claim that he thereby acquired title for himself. A rescuer acting on behalf of the rightful owner cannot subsequently claim title on his own behalf. Nor can a finder of lost property claim title to such property on the basis of *yi'ush* occurring subsequent to his assumption of the duties of a bailee. The finder, upon assuming the duties of a bailee, must preserve the bailment on behalf of the rightful owner.

Professor Guttmann's claim to title rests upon the contention that he received the books and manuscripts as a gift. That argument presents an entirely new legal issue. Ordinarily, the burden of proof is upon the plaintiff. Since Guttmann is in possession of the disputed property, the general rule of *muḥzak* would ostensibly apply, that is, a person in possession of property who asserts a claim of title to that property is presumed to be the rightful owner.[61] The burden of proof lies with the litigant who seeks to defeat the prima facie evidence of possession. It follows that, since Guttmann is in possession of the disputed books and manuscripts, presumption of title lies with him, and the plaintiff bears the burden of demonstrating that Guttmann's claim of title is specious.

However, if Guttman's claim of title can be rebutted, the fact

[61] See generally 14 *Encyclopedia Talmudit* 40-81.

that Guttmann is a *muḥzak*, that is, that he is in actual possession of the disputed property, would not itself serve to establish title, particularly since the concept of a statute of limitations is alien to Jewish law. The fact that a litigant is a *muḥzak* merely serves to confirm an otherwise cogent claim but, absent a cognizable claim, *muḥzak* alone is an irrelevant factor. The Attorney General contended that, even granting that Veit Simon gave the books to Guttmann as a gift, Guttmann did not acquire valid title thereby because Veit Simon lacked the legal authority to make such a gift. If so, Guttmann's claim of title is defective and his status as a *muḥzak* is of no significance.

The bylaws of the *Hochschule* indeed provided that such matters be subject to determination by the *Kuratorium* as a whole and were not to be within the domain of any single officer.[62] Nevertheless, this argument would not necessarily defeat Guttmann's claim of ownership. Professor Guttmann candidly conceded that he had no knowledge of any action by the *Kuratorium* and was ignorant of any bylaw requiring any such action. Guttmann simply assumed that Veit Simon had the authority to act as he did. Such a presumption appears to be entirely compatible with the provisions of Jewish law. The general presumption is that a person in possession of chattel lawfully enjoys the prerogatives he asserts with regard to such chattel. According to Guttmann, Veit Simon clearly asserted that he had the authority to dispose of the books and manuscripts. The fact that he delivered those items to Guttmann with the knowledge and assistance of both the Secretary and the Librarian of the *Hochschule* lends credence to that assertion. Hence, it must be assumed that Veit Simon's colleagues on the *Kuratorium* either specifically authorized his action or that, since formal meetings were forbidden by the German authorities and were extremely dangerous, the members of the *Kuratorium* delegated their responsibility to Veit Simon and authorized him to act on their behalf without prior consultation. The burden of proof in adjudicating a claim of irregularity with regard to an obstensibly legal action is upon the plaintiff.

Nevertheless, despite the distinct advantages enjoyed by the *muḥzak* in Jewish law, possession is not always prima facie evidence of ownership. At times, other principles are dispositive. When neither claimant is in actual possession of the disputed property, or

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62 *Statut der Lehr-Anstalt für die Wissenschaft des Judenthums* §§ 6, 8 (1907) (giving the board the power to act as agent for the institute in dealings with third parties and the obligation to oversee the financial affairs and property of the institute) (annexed to Defendants' Affidavits in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Abrams v. Sotheby Parke-Bernet, Inc., No. 42255/84 (N.Y. Sup. Ct. Aug. 14, 1984).

when possession is not regarded as evidence of ownership, evidence of prior ownership generates a presumption of continued ownership.[63]

To be sure, the general rule regarding chattel is that when one litigant is in possession, his status as *muḥzak* prevails against evidence of prior ownership. However, in certain limited situations that is not the case. One notable exception to the probative value of *muḥzak* is found in the claim of an artisan to ownership of artifacts in his custody. The rule governing such situations is that possession does not constitute prima facie evidence of ownership of items which an artisan customarily accepts for purposes of repair since the artisan's possession of those items is readily explainable on other grounds.[64] The same principle would assuredly apply to raw materials customarily provided to a worker employed in a cottage industry. Presumably, the principle would also apply to a laborer who uses his employer's tools and who, in the course of his labor, customarily removes those tools from his employer's premises. Under such circumstances, physical possession of the tools would not serve to support a claim of title. *Mutatis mutandis*, a scholar who is customarily entrusted by his employer with library materials for the purpose of facilitating his research, would not prevail on the basis of his status as a *muḥzak* in a dispute regarding ownership of such items.

Whether or not Guttmann enjoyed "artisan" status in relation to the disputed books and manuscripts depends largely upon (1) whether he was actively engaged in research, (2) whether those items were directly related to his research, and (3) whether the *Hochschule* ordinarily entrusted materials of a like nature to members of the faculty for use in their homes or offices in conjunction with their research. It is, however, unlikely that all the items in dispute were related to Guttmann's scholarly research. It is certainly unlikely—but not impossible—that the rarest items, viz., the Prague Bible and the illuminated Spanish High Holiday prayer book, were related to any academic project in which Guttmann, a professor of rabbinics, may have been engaged. To defeat Guttmann's reliance upon the principle of *muḥzak*, the plaintiff must prove that the books and manuscripts were related to Guttmann's research and that Guttmann was, in effect, an artisan.[65]

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[63] This principle is known as *ḥezkat mara kamma*. See generally 14 *Encyclopedia Talmudit* 147-174.

[64] See *Shulḥan Arukh, Ḥoshen Mishpat* 134:1.

[65] It should be noted that there is a more fundamental reason why the claim that Guttmann is an artisan who cannot prevail on the basis of *muḥzak* would fail to support the pleading submitted by the Attorney General. As recorded in *Shulḥan Arukh, Ḥoshen Mishpat* 134:1, the original owner prevails over an artisan upon the claim that he delivered the property

Another exception to the rule of *muḥzak*—and one which is more germane in the instant case—is the category of objects that are designed to be lent or leased. Possession of such property does not generate presumption of title.[66] The rationale underlying this provision is readily understandable. Ordinarily, possession combined with claim of title places the burden of proof upon the opposing party because possession constitutes prima facie evidence of ownership. In the usual course of events, it may be assumed that an individual is in possession of an object precisely because he is the rightful owner. No such presumption exists with regard to chattels that are customarily lent or leased since custody of the property can just as readily be attributed to loan or lease. Ordinarily, possession constitutes stronger evidence of title than does prior ownership. However, with objects designed to be lent or leased, evidence of prior ownership establishes a stronger presumption of title than does current possession.[67]

There is considerable disagreement among early authorities over

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to the artisan for "repair." *Shakh, Shulḥan Arukh, Ḥoshen Mishpat* 134:2, points out that a prior owner would not prevail with a claim that he lent or leased the disputed item to the artisan. Nor, presumably, would the prior owner prevail with a claim that the artisan had stolen the object in question. Accordingly, in order to prevail against Professor Guttmann, the prior owner would have to claim explicitly that the books and manuscripts were delivered to him for use in his research, but a prior owner would not prevail with a claim that they were delivered to him merely for safekeeping. The underlying principle is that the claim must be that the chattel was delivered for a purpose associated with the artisan's craft. For an artisan, physical possession of the disputed property does not serve to rebut a claim of such nature. However, the fact that an artisan is a *muḥzak* does serve to rebut any other claim. Nor does the plaintiff enjoy the benefit of a *migo*, i.e., the contention that he might have pleaded that the item was delivered to the artisan for a purpose associated with his craft, thereby giving credence to his claim that it was delivered to the artisan for safekeeping. Such a plea is of no avail because *migo* cannot be invoked against a *muḥzak*. See Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 82:12. For a discussion of the principle of *migo*, see infra note 88 and accompanying text.

Nevertheless, in the present case, if it is ascertained that Guttmann had the status of an artisan vis-a-vis the books in question, he would not prevail on the basis of physical possession even though there is no actual claim that those items were lent to him for use in conjunction with his research. Indeed, since there are no survivors possessing actual knowledge of the circumstances surrounding the transfer of those items, no one is in a position to refute Guttmann's contention. Nevertheless, as will be shown later, in such circumstances, the appropriate pleading is entered on behalf of the heirs by the rabbinic court on its own motion. In acting on behalf of "orphans," the court enters whatever plea is in the best interest of the heirs who, lacking personal knowledge, are themselves unable to enter a plea. In this case, the rabbinic court would interpose the argument that the books might well have been lent to Guttmann for use in conjunction with his research.

66 See *Shulḥan Arukh, Ḥoshen Mishpat* 133:5.

67 Whether or not proof of prior ownership prevails against a successor in due course who is a *muḥzak* with respect to items which are customarily lent or leased is the subject of a controversy between *Shulḥan Arukh* and Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 133:7. The rule is in accordance with Rema who maintained that a claim of prior ownership prevails even against a successor in due course.

the precise delineation of this category of chattel. According to some few authorities, most prominent of whom is Maimonides, the category includes only objects that are manufactured or fashioned in order to be lent or leased.[68] Maimonides understands the talmudic term *asuyin le-hashil u-le-haskir* quite literally as meaning "*made* for the purpose of lending or leasing." Accordingly, he understands this category as limited to objects such as "large copper pots that are used for cooking in banquet halls,"[69] ornaments utilized for the adornment of brides and similar objects produced or manufactured not for the use of a single consumer, but rather, designed to be leased to a succession of users. Excluded, according to Maimonides, are all items designed for personal use including those which lend themselves to sharing with others, "for even a person's shirt and his bedclothes and bed may be lent."[70] Nevertheless, Maimonides freely concedes that some individuals habitually lend or lease ordinary chattels, and hence, if there are witnesses to the fact that the item was loaned or leased on a regular basis, the item is deemed to be included in the category of chattels with regard to which possession does not constitute evidence of ownership. Thus, although books are not among the items which are produced specifically for purposes of lending, nevertheless, books acquired by a lending library would certainly be included in that category.

Most authorities, however, including Alfasi and Rabbenu Tam, define the category much more broadly,[71] to include in it any item customarily lent or leased to others provided that the object's owner is also known to lend or lease his chattel to others.[72] Excluded are expensive items and items of unique value which are not customarily shared with others. A number of authorities take note of the fact that individual sharing practices are highly subjective and accordingly rule that whether a specific item falls within this category must be determined by the judge on a case-by-case basis in accordance with his assessment of the personalities of the litigants and the relationship between them.[73] The determination, declares Rema, *Shulḥan Arukh*,

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[68] Maimonides, *Mishneh Torah, Hilkhot To'en ve-Nitan* 8:9.

[69] Id.

[70] Id.

[71] See *Shulḥan Arukh, Ḥoshen Mishpat* 72:19.

[72] There is considerable disagreement among early authorities with regard to whether the item must be one which is generally lent or leased, with regard to whether the owner must be known to lend or lease chattel in general or the item in dispute in particular, and with regard to whether the owner must be known to lend or lease chattel to people in general or to the *muḥzak* in particular. See sources cited in 7 *Encyclopedia Talmudit* 150. The normative position adopted by Rema is cited in the text.

[73] See *Tur Shulḥan Arukh, Ḥoshen Mishpat* 72.

Ḥoshen Mishpat 72:19, is to be made "according to the perception of the judge in accordance with [his assessment of] the plaintiff and the defendant." Thus, unlike the application of most principles of Jewish law, the determination of this point is, in effect, subjective in nature and lies with the judgment of the court.

There is certainly strong basis for the argument that books which are customarily lent by libraries and academic institutions to faculty members and students must fall within this category. If so, evidence of prior ownership by the *Hochschule* might prevail against the evidentiary probity of Guttmann's present possession. The *Gemara*, *Baba Metsi'a* 116a and *Shevu'ot* 46b, records that in a dispute over the ownership of a certain aggadic volume, Rava ruled that the book must be returned to its original owner. Physical possession by the defendant, ruled Rava, was not determinative because the book was characterized as a chattel which is customarily lent to others. Rashi, *Shevu'ot* 46b, maintains that Rava's ruling applies only to those aggadic volumes which a person "does not study constantly," but not to books in general, because books are not customarily lent to others since they may become damaged through constant use. Most early authorities, however, follow the diametrically opposite position of *Tosafot*, *Avodah Zarah* 46b, which states that all sacred books must a fortiori be considered things which are customarily lent or leased because it is a religious duty to lend sacred books to others for purposes of study. It may be assumed that Rashi would concede that reference works which are consulted only sporadically and for brief periods are in a category similar to aggadic works.

In rebuttal, it may be argued that rare books and manuscripts are not ordinarily lent to individuals for removal from the library premises. Rabbenu Asher[74] and R. Menaḥem Meiri[75] state that books which are "important" or "desirable" are not included in the category of things which are customarily lent or leased. R. Meir of Rothenberg issued a similar ruling with regard to manuscripts.[76] Thus it might appear that the rare books and manuscripts in the Sotheby collection are not to be considered books that are customarily lent or leased. Accordingly, since Guttmann was in possession of those items, the plaintiff would bear the burden of proof to refute Guttman's claim of ownership.

This conclusion, however, is open to question. It is indeed the case that libraries limit access to rare books and do not allow such

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[74] Rosh, *Shevu'ot* 7:5.

[75] Cited by *Shitah Mekubetset*, *Baba Kamma* 114b, s.v. *shema*.

[76] *Teshuvot Maharam Rothenberg*, No. 480.

books to circulate. Nevertheless, it is not entirely unheard of for academic libraries to grant unusual privileges to certain scholars and faculty members. Consistent with Rema's ruling that whether or not an item is deemed a chattel designed to be lent or leased is to be determined on the basis of the court's assessment of the character and relationship of the litigants, a court might very well seek evidence concerning the *Hochschule*'s policy with regard to such matters and particularly as to whether Guttmann enjoyed such privileges.[77] Moreover, given the unusual circumstances of the late 1930's, even rare volumes might have been "designed to be lent" since a prudent librarian might have become convinced that those works would be safer in private hands. Rema's ruling that such a determination is to be made "according to the perception of the judge in accordance with [his assessment of] the plaintiff and the defendant" is certainly germane in this instance. Of particular relevance in reaching such a determination is whether the *Hochschule* administration entered into, or sought to enter into, similar arrangements with other scholars in order to save at least a portion of the *Hochschule*'s collection of rare books and manuscripts from the Nazis. A rabbinic court would undoubtedly seek such evidence.[78]

It must also be stressed that, in accordance with Rema's ruling, in order for the plaintiff to prevail, a rabbinic court would have to find not only that the *Hochschule* would have lent the items in question under such circumstances, but also that Guttmann would have borrowed them. Rema stresses that the judge must assess the personalities of *both* the plaintiff and the defendant. Upon the facts of the case the court might well find it unlikely that a person would risk his life to preserve property belonging to others.

In an opinion accompanying his injunction restraining consummation of the sale, Justice Robert E. White observed that "it seems likely that Guttmann was one of many individuals who, in the Mosaic tradition, was [sic] charged with the safe transmission of the law and

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[77] In a deposition submitted to the New York Supreme Court, Professor Guttmann declared that he was not permitted to remove rare books from the library premises. See Exhibits A & B to the Affadavit of Richard J. Davis submitted in Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction at 14, Abrams v. Sotheby Parke-Bernet, No. 42255/84 (N.Y. Sup. Ct. Aug. 24, 1984).

[78] Such evidence may, of course, be difficult to obtain at this late date. In depositions submitted to the court, a number of persons associated with the *Hochschule* and Hebrew Union College testified that none of the other individuals associated with the *Hochschule* who succeeded in fleeing Germany brought similar rare books or manuscripts with them. See Findings & Conclusions of Law of Defendants at 16, Abrams v. Sotheby Parke-Bernet, No. 42255/84 (N.Y. Sup. Ct. June 14, 1985).

culture of the Jewish people."[79] That observation reflects an ideological assumption which, although common in other cultures, is foreign to Jewish tradition, at least in its application. To be sure, rabbinic literature dating from the talmudic period is replete with references to incidents in which individuals accepted martyrdom in order to disseminate Torah and to transmit the Oral Law.[80] However, preservation of rare books and manuscripts, whose value is entirely historical and cultural, is in no way comparable to the preservation of the legacy of Sinai. The Torah is the patrimony of Israel, and hence, its preservation is synonymous with national self-preservation. Since preservation of life takes precedence over other values, including preservation of cultural legacies, Jewish law would disfavor endangerment of life to preserve even the most priceless historical treasure.

Quite to the contrary, self-endangerment that would not be sanctioned for the purpose of preserving cultural legacies might well be regarded as legitimate if assumed for purposes of securing a livelihood. In a responsum which has become classic in the annals of rabbinic law, R. Ezekiel Landau ruled that hunting, when pursued as a sport, is forbidden because of the attendant danger but is nevertheless permitted to a person who earns his livelihood thereby "since everything which is for the purpose of one's sustenance and livelihood" is permitted by Jewish law.[81] In support of this position, R. Ezekiel Landau cites the statement of the *Gemara, Baba Metsi'a* 112a, exhorting the timely payment of a laborer's wages. The *Gemara* cites the verse "for he setteth his soul upon it" (Deuteronomy 24:15) and comments: "Why did he go up on a ladder, hang from the tree, deliver himself to death, if not for his wages?" It is clear, asserts R. Ezekiel Landau, that the *Gemara* recognizes an exemption from the general prohibition against exposing oneself to danger when the danger is assumed for the sake of earning a living.

There is little question that had a Jew approached a competent rabbinic authority in Berlin in 1939, informed him that he had the opportunity of smuggling rare books and manuscripts out of Germany in order to preserve them for posterity, apprised him of the attendant danger, and requested a ruling regarding the propriety of pursuing such a course of action, the rabbinic decisor would have ruled the action impermissible. Had the interlocutor, however, stated that he was departing for a distant land, that he was impoverished

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[79] Abrams v. Sotheby Parke-Bernet, No. 42255/84 at 7 (N.Y. Sup. Ct. Aug. 24, 1984) (order granting preliminary injunction).

[80] See, e.g., *Berakhot* 60a; *Sanhedrin* 14a.

[81] E. Landau, *Mahadura Tinyana, Yoreh De'ah*, No. 10.

and that his prospects for being able to support a family were bleak, but that he had the opportunity to smuggle rare books out of Germany in order to sell them so that he might support himself and his family, the rabbinic authority's response might well have been positive.

Accordingly, even if it is determined that the books and manuscripts in dispute were items designed to be loaned insofar as the *Hochschule* was concerned, the court, in accordance with the dictum of Rema requiring an assessment of the character and disposition of both litigants, could not find for the plaintiff unless it were also to determine that Guttmann subscribed to a value system which would have permitted him to jeopardize his life solely for the sake of preserving historical and cultural treasures.

One further point must be made regarding resolution of disputes regarding chattel which are customarily lent or leased. Evidence of prior ownership may be invoked against one who is in possession of chattel only when accompanied by a claim that the property was lent or leased to the *muḥzak*. In terms of normative law, evidence of prior ownership may not be invoked in support of a claim of theft other than against a notorious thief.[82] A claim that the property was delivered to the *muḥzak* simply for safekeeping would not prevail against a *muḥzak* except on the basis of *migo*,[83] that is, only when a claim that it was delivered to the *muḥzak* as a loan would prevail were such a claim to have been advanced. Accordingly, the argument to be made against Guttmann is not that the books and manuscripts were delivered to him simply for safekeeping but that they were lent to him for his own use until such time as they might be restored to a relocated *Hochschule*. Hence, in determining whether a prior owner would prevail, a finding of whether the books and manuscripts were customarily lent under the circumstances prevailing at the time becomes a matter of crucial significance.

The Attorney General did not claim that the *Hochschule* books were loaned to Guttmann; rather, he claimed that they were entrusted to Guttman for safekeeping. Such a claim is ordinarily recognized by Jewish law only on the basis of *migo*. In order to prevail on the basis of *migo*, the argument that the chattel were loaned to Guttmann would have to be of sufficient force to prevail had it been advanced on

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82 See conflicting authorities cited in *Shulḥan Arukh, Ḥoshen Mishpat* 90:11 and the definitive ruling of *Shulḥan Arukh, Ḥoshen Misphat* 133:6. See also *Shulḥan Arukh* and Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 357:1.

83 *Migo* is of no support with regard to a claim of simple theft since there is a strong presumption in Jewish law that an individual will not commit an act of theft. See *Shulḥan Arukh, Ḥoshen Mishpat* 133:6.

its own merit. Indeed, were an argument that the property was a simple bailment to prevail, the very concept of *muḥzak* would be rendered a nullity. Such a claim, were it to be entertained, would prevail regarding objects customarily deposited with bailees. That category—unlike the category of items customarily lent or leased—is virtually all-encompassing. In the instant case, however, this point is irrelevant. Under Jewish law, the court, acting on behalf of the heirs, would on its own motion advance the claim that the books had been lent to Guttmann; there would be no need to assert that they were delivered to him for safekeeping. If the books were designed to be lent or leased, a claim of prior ownership would ordinarily prevail, and the burden of proof would shift to Guttmann.

Despite the foregoing, the fact that the books and manuscripts were items customarily lent is not in itself dispositive. The principle of *muḥzak* may yet apply even if the books and manuscripts are judged to fall within that category. *Shakh*, *Shulḥan Arukh*, *Ḥoshen Mishpat* 72:91, raises a serious question: How can a person who has purchased an item of this nature ever establish proof of valid title? The original owner can always falsely claim that the item was not sold but merely loaned or leased and recover the item from the *muḥzak* on the basis of proof of prior possession. *Shakh* responds by asserting that a claim of purchase will prevail against a prior owner of chattels customarily lent or leased provided that the claim is asserted immediately upon discovery of the object in the possession of the *muḥzak*.[84] Under such circumstances, the *muḥzak* enjoys the benefit of *migo*, that is, he might have concealed the object in question.[85] Had the item been concealed there would have been no occasion for litigation. However, once an object that is customarily lent or leased is known to be in a person's possession, that person can no longer assert a claim to title based on purchase. Presumably, the same considerations apply to gratuitous transfers. Thus, even assuming that the items are those which are customarily lent or leased, one might argue that Guttmann might prevail by operation of the *migo* of concealment. However, this argument is readily rebutted. Guttmann, it would appear, cannot rely upon a *migo* of concealment since, at this point in time, the value of the books and manuscripts to him lies solely in their saleability. It would have been impossible for Guttmann to sell the books and manuscripts without both the sale itself and the fact that the books were

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[84] See also Y. Epstein, *Arukh ha-Shulḥan*, *Ḥoshen Mishpat* 72:43.

[85] Cf. Y. Eibeschutz, *Te'umim* 72:35 and *idem*, *Klalei Migo* § 34, who disagrees with *Shakh* and rules that a claim of purchase regarding objects which are customarily lent or leased can never be asserted against a prior owner on the basis of current possession.

originally part of the *Hochschule* library becoming public knowledge. Hence, it may be contended that Guttmann cannot rely upon a *migo* of concealment. Accordingly, were it established that the books fall within the category of things customarily lent or leased, the prior owner would prevail.[86]

IV. *ZUTO SHEL YAM* AS AN ALTERNATIVE PLEADING

As noted above, there is considerable question whether any person might have entered the library of a Jewish institution in Berlin in 1939, removed books and manuscripts, and thereby have acquired valid title on the basis of the *zuto shel yam* principle, that is, on the basis of the consideration that property facing imminent destruction is already deemed *res nullius*.[87] Ostensibly, however, resolution of this question is irrelevant insofar as Guttmann is concerned. Professor Guttmann is barred from establishing a claim to title on the basis of such a pleading because of his own contention that the disputed items were delivered to him in an attempt to prevent them from falling into Nazi hands. By Guttmann's own admission, destruction of the books was not imminent. The sole issue is whether these items were conveyed to him as a gift or accepted by him as a bailment. Had Guttmann taken possession of those items to preserve them for the bailor, he could not later claim to have acquired title to property which was *res nullius*.

Nevertheless, the question of whether Guttmann might prevail had he advanced the claim that he simply took the books, intending to keep them for himself in order to prevent them from falling into the hands of the Nazis, may well be dispositive even though Guttmann has conceded that this was not the case.

Jewish law incorporates the principle of *migo* in assessing the merit of certain pleadings. This principle has the effect of assigning a litigant the advantages of alternative pleadings which have not been advanced. Indeed, the litigant is granted not only the benefits of a foregone pleading but even the benefits of a pleading which is conced-

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[86] See R. Jacob of Lissa, *Netivot ha-Mishpat* 72:34 who states that *Shakh* must be understood as ruling that a claim of purchase is sustained by *migo* only if the item is gratuitously displayed before the witnesses, but not if, for example, the person seized thereof dons a garment "for his own benefit" and only upon becoming aware of the presence of witnesses who recognize the garment as the presumed property of another does he declare that he has acquired title by virtue of purchase. Under such circumstances, asserts *Netivot ha-Mishpat*, there exists no *migo* of concealment. According to *Netivot ha-Mishpat*, adjudication of the question of whether or not a valid *migo* exists is in every case contingent upon "the assessment of the judges" with regard to whether the litigant might have concealed the object without prejudicing his own interests.

[87] See supra notes 39-43 and accompanying text.

edly false.[88] For example, a claim of prior repayment is not a good defense against the execution of a promissory note when a properly executed note is produced. The allegation of earlier repayment is deemed rebutted by the assumption that a debtor would not allow a creditor to retain possession of an instrument securing a loan which has been repaid. Rather, the debtor would withhold payment until the note is delivered to him. However, unless the signatures of the attesting witnesses are authenticated, the defendant will ordinarily prevail if he claims the instrument is forged. A blameless defendant who, contrary to usual practice, has satisfied his indebtedness but has neglected to retrieve his promissory note is faced with a difficult choice: He may candidly concede the authenticity of the instrument and lose the case because his plea of prior payment cannot be accepted, or he may falsely claim the instrument to be a forgery in order to exonerate himself from payment of funds that he no longer owes. *Migo* effectively gives the debtor the advantage of pleadings he does not wish to advance for reasons of truthfulness. Since a pleading of forgery would have been sustained had it been made, a pleading of prior repayment will also be accepted and, by operation of law, given the same consideration as a pleading of forgery. The operative principle is that if the litigant was untruthful in advancing a claim of prior payment, he might have availed himself of a simpler and more direct falsehood by denying that a debt had ever existed, and claiming that the instrument upon which the plaintiff relied was a forgery.

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[88] The principle of *migo* is somewhat similar to pleadings in the alternative which are a feature of other legal systems. The American legal system permits pleadings setting forth two or more statements by way of claim or defense which are not only inconsistent, but are mutually exclusive. The singleness requirement of the writ system that prevailed in early common law would have rendered the very notion of *migo* inconceivable. Under that system, a defendant might have several, possibly uncontradictory defenses for a particular count and yet be forced to select one of them and abandon the others. If he chanced to lose on the defense he selected, the fact that he might have succeeded on another defense would have been of no avail. This barrier was removed by statute in 1705. 4 Anne ch. 16, § 4 (1705). Subsequently, a defendant was permitted to interpose several pleas to the same count with no requirement that these pleas be consistent with each other.

The famous Case of the Kettle, which is part of the folklore of the common law, probably best exemplifies the admissibility of inconsistent alternative pleading. The plaintiff claimed damages for a kettle which he asserted the defendant had borrowed and had allowed to become cracked while in his possession. In answering that complaint, the defendant is reported to have pleaded: (1) that he did not borrow the kettle, (2) that the kettle was never cracked, and (3) that the kettle was cracked when he borrowed it. See C. Keigwin, Precedents of Pleading at Common Law 270 (1910).

Whatever the sufficiency of alternative pleading in the past, under Rule 8(e)(2) of the Federal Rules of Civil Procedure and the provisions of other modern procedural codes, such pleading is perfectly proper although, for obvious reasons, such inconsistent pleadings are seldom advised. In Jewish law the alternative pleading need not actually be advanced; the rabbinic court assigns the advantages of the foregone pleading by operation of law.

A similar principle may operate to the advantage of Guttmann. If Guttmann's claim of title by gratuitous conveyance does not prevail, it is because of a *halakhic* determination that the disputed books are things which are customarily lent or leased. If so, physical possession is not sufficient to overcome a claim that the items were delivered as a bailment, since that claim is supported by evidence of prior possession.

However, prior possession would not defeat a claim to title by Guttmann predicated upon the principle of *zuto shel yam*. To be sure, as earlier indicated, the facts alleged by Guttman serve to negate any possible invocation of the *zuto shel yam* principle. Nevertheless, Guttmann may yet avail himself of the advantages of contrafactual invocation of the *zuto shel yam* principle through *migo*. Were it to be established that a pleading of facts compatible with *zuto shel yam* would prevail, Guttmann would be entitled to whatever advantage he might have gained based on that pleading even though the pleading he advanced cannot prevail on its own merits.

The principle of *migo*, however, is not universally applicable. The advantages of foregone pleadings are available only to a defendant, not to a plaintiff. To put the same principle more precisely, the advantages of *migo* are available only to confirm possession of property but not to force a transfer of money or chattel.[89] At first glance, this constraint upon the application of *migo* should not bar its use to Guttmann's advantage since he is in actual possession of the disputed property. There is, however, some controversy among early authorities with regard to whether the advantages of *migo* may be employed against a claim of prior ownership. *Tosafot*, *Baba Batra* 32b, followed by a number of other talmudic commentators, asserts that the question of the efficacy of *migo* in the face of evidence of prior ownership is the subject of a disagreement between Rabbah and Rav Yosef concerning adjudication of a dispute involving conflicting claims to real property. The *Gemara*, *Baba Batra* 32b, rules in accordance with the opinion of Rabbah who maintained that the principle of *migo* is applicable even in such circumstances. This rule has been codified by both Maimonides[90] and the *Shulḥan Arukh*.[91] *Tosafot*, ad locum, also maintains that the benefits of *migo* prevail against evidence of prior ownership, but only when the litigant seeking to prevail on the basis of *migo* is in possession of the disputed property.[92]

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89 Rema, *Shulḥan Arukh, Ḥoshen Mishpat* 82:12.

90 Maimonides, supra note 68, 15:9.

91 *Shulḥan Arukh, Ḥoshen Mishpat* 146:25.

92 See also 1 Y.T. Halperin, *Teshuvot Malbushei Yom Tov, Even ha-Ezer*, No. 15, s.v. *ha-*

V. Ownership of Communal Property

Finally, a basic question which must be answered is whether there exists a plaintiff who is in a position to advance a claim against Guttmann. Were the books in dispute property which had formerly belonged to a private party, according to Jewish law, only the original owner or his heirs would be entitled to sue Guttmann for recovery of the property. In the unlikely event that no living survivor could establish even a remote degree of kinship, the property would have become *res nullius* upon the demise of the original owner and his heirs and, at that point, Guttmann could have acquired title. The argument might be made that the *Hochschule* is defunct and its property rendered *res nullius*. Arguably, since there is no concept in Jewish law of a "successor institution," there exist no surviving heirs who may claim to have inherited the property of the *Hochschule*. Hence, Guttmann would be entitled to retain what, in effect, became ownerless property.

Such a contention, however, is not supported by Jewish law. In Jewish law, corporations and organizations lack capacity to hold property as "legal persons." Property must be held by individuals, otherwise it is ownerless. Corporations, at least for purposes of holding property, are regarded in Jewish law as partnerships.[93] Similarly, communal property is deemed to be held in partnership by members of the community.

This principle and its application to the property of the *Hochschule* is illustrated by the provisions of law which apply to the sale of synagogue buildings. The *Gemara*, *Megillah* 26a, declares that synagogues located in metropolitan areas cannot be sold. Rashi and Rashba, in their respective commentaries explain that ownership of

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yotseh. It may be noted that this qualification is disputed by the author of *Shev Shemateta* 4:24 and *Ketsot ha-Ḥoshen* 82:13, who maintains that *migo* may be invoked against a claim of prior ownership even when the pleading is not advanced by a person actually in possession of the disputed property. However, this issue is not relevant insofar as the Sotheby sale is concerned since Guttmann is clearly in possession of the disputed property.

93 See, e.g., 3 Y. Breisch, supra note 8, No. 191. For a discussion of the status of corporations in Jewish Law, see Kirschenbaum, Legal Person, in 10 Encyclopedia Judaica 1567-70. See also J. Asad, *Teshuvot Maharí Asad*, No. 124; M. Schick, *Teshuvot Maharam Shik, Yoreh De'ah*, No. 158; S. Kluger, *Ha-Elef Lekha Shlomoh, Oraḥ Ḥayyim*, No. 238; E. Preil, *Sefer ha-Ma'or*, No. 25 (5713); S. Weingurt, *Yad Sha'ul* 35-49 (5713); 3 Y. Weisz, *Teshuvot Minḥat Yitsḥak*, No. 1; 3 M. Sternbuch, *Mo'adim u-Zemanim*, No. 269, n.1; 6 M. Klein, *Mishneh Halakhot*, No. 277; Wasserman, *Ribbit be-Halva'ah Bankit*, 3 *No'am* 195-203 (5720); Auerbach, *Din Ribbit le-Bankim u-le-Esakim she-hem be-Erav'on Mugbal, ha-Ne'eman* 6-10, 12 (Tishri 5723); Hibner, *Ḥametz shel Ḥanut ha-Shayekhet le-Ḥevrat Maniyot, Ha-Darom*, No. 24, at 108-16 (Tishri 5727). Cf. Katzenellenbogen, *Le-Ba'ayat ha-Ribbit*, 3 *Yavneh*, No. 7-12, at 175-79 (Nisan 5709), reprinted in 12 *No'am* 322-31 (5729), and subsequently reprinted in R. Katzenellenbogen, *Be'er Ro'i*, No. 25 (5742).

such property is not vested solely in the inhabitants of the city; rather, "everyone" has a proprietary interest in the synagogue property. Hence, since it is impossible to secure the acquiescence (either personally or through communal officers acting as agents) of each and every person who enjoys a proprietary interest, including those living in distant areas, the property cannot be alienated. *Tosafot*, Rashba, and Rabbenu Nissim, explain that all persons who contribute to the construction of a house of worship acquire a partnership interest therein. The synagogue of a village or hamlet is customarily erected solely with funds contributed by local inhabitants, and hence, can only be sold with the acquiescence of the local population or their designated representatives. In large cities, funds for the construction of a synagogue are customarily solicited not only from local residents but also from travelers and others who are not residents of the city. Since, with the passage of time, those contributors can no longer be identified, such edifices cannot be sold. In another formulation of the distinction between metropolitan synagogues and those located in other areas, *Tosafot* and Rabbenu Asher explain the matter somewhat differently. These authorities explain that the benefactors intend title to be vested in all worshippers who use the edifice on a regular basis. A worshipper who relocates elsewhere does not automatically forfeit his proprietary interest. Thus, since in a large city it is impossible to locate each and every one of the vast number of people who at one time were regular worshippers, the synagogue of a metropolitan area cannot be sold.[94]

The various lines of reasoning advanced by each of these authorities appear to apply to the property of the *Hochschule*. The institution and its library were established and supported by the *Gemeindesteuer*, a communal tax levied upon all German Jews, and through the beneficence of Jews throughout the world. The benefactors certainly intended that the resources of the library be placed at the disposal of all scholars who might avail themselves of its facilities. Although authority to buy and sell property for the benefit of the institution may well have been vested by those benefactors in the officers and members of the board of the *Hochschule*, in Jewish law, title remains vested either in the benefactors or in the intended benefi-

[94] Other reasons for the restriction against the sale of synagogue buildings in metropolitan areas are advanced by Maimonides, *Mishneh Torah*, *Hilkhot Tefillah* 11:16, and by Rashba and Rabbenu Nissim, *Megillah* 26a. Those reasons have the effect of expanding the prohibition to preclude the sale of such edifices under all circumstances but do not negate the considerations advanced by the authorities who countenance sale in some limited and unlikely situations, viz., in situations in which agreement to the sale by all benefactors and previous worshippers is forthcoming.

ciaries and their respective heirs. The property therefore remains a charitable trust to be utilized for the purposes intended by the benefactors.[95] At most, Guttmann might claim that, as the sole surviving member of the faculty of the *Hochschule*, and as the designated custodian of the books and manuscripts in his possession, he is entitled to the prerogatives of a trustee and, in that capacity, he may claim the right to chose a successor, that is, he may designate the institution which is to be awarded custody of those items for the continued use of scholars.

Nevertheless, as shown earlier, absent a finding that Guttmann has the *halakhic* standing of an artisan or a finding that the books and manuscripts in dispute are in the category of "items customarily lent or leased," Guttman's claim that the items in his possession were presented to him as a gift would prevail unless that claim were to be refuted by contradictory evidence.

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[95] This certainly appears to be the position adopted by 3 Y. Weinberg, supra note 22, with regard to the property of the defunct Hildesheimer Seminary.

ED. NOTE: To aid the uninitiated in following Professor Bleich's article, we offer a brief chronological overview of the basic rabbinic texts cited therein.

The oral interpretation of biblical law, passed down from Moses through the sages of each generation, was first codified and redacted by R. Judah ha-Nasi (d. 219 C.E.) in the topical compendium known as the *Mishnah*. The *Mishnah* is subdivided into six Orders, each of which deals with a broad self-contained area of the law (e.g., *Nezikin* (Torts)). The six Orders are further subdivided into a total of sixty-three tractates, each of which explores a circumscribed topic (e.g., *Sanhedrin* (Courts)) within the more general Order. Scholars of the *Mishnahic* era are known as *Tanna'im*. The *Gemara*, a large body of commentary to and expansion upon the *Mishnah*, developed over the next four centuries. There are two *Gemarot* (plural of *Gemara*), one that was composed in the Babylonian academies and another that represented the contributions of Palestinian scholars. The former is the more exhaustive of the two *Gemarot*; citations to any of the tractates refer to the Babylonian *Gemara* unless otherwise indicated. Scholars cited in the *Gemara* are known as *Amora'im*. The *Mishnah* and the *Gemara* form the component parts of the Talmud, the basic text of rabbinic learning. Citation to the Talmud is made to the tractate and the page (e.g., *Sanhedrin* 3a).

The post-talmudic history of Jewish scholarship is divided into three eras: the era of *Ge'onim* (roughly 500-1050 C.E.), the era of the *Rishonim* (early scholars—roughly 1050-1550), and the era of the *Aḥaronim* (latter-day scholars—roughly 1550 to the present). Outstanding among the *Ge'onim* is Saadia Gaon, whose philosophical works are considered classics to this very day. Prominent among the *Rishonim* whose works are cited in this article is Maimonides (1135-1204), author of the *Mishneh Torah*, a formal code of Jewish law. This code is divided into a number of books, each book being subdivided into sections, chapters, and laws. Citations to the *Mishneh Torah* are to the work itself, the section, chapter, and law (e.g., *Mishneh Torah, Hilkhot Tefillah* 11:16). R. Joseph Karo's *Shulḥan Arukh*, composed during the middle of the sixteenth century, serves as the authoritative Code of Jewish Law. The *Shulḥan Arukh* is divided into four subdivisions which are further broken down into chapters and laws. Citations to the *Shulḥan Arukh* are to the work itself, the subdivision, chapter, and law (e.g., *Shulḥan Arukh, Ḥoshen Mishpat* 356:2). Commentary on the *Shulḥan Arukh*, which appear on the same page as the text in the standard version of the code, are cited by author, the work itself, subdivision, chapter, and law (e.g., *Shakh, Shulḥan Arukh, Ḥoshen Mishpat* 256:7). Other *Rishonim* cited in this article include:

Rashi (R. Solomon ben Isaac; 1040-1105), a French scholar and the foremost commentator on the Bible and the Talmud. Rashi's commentary is an explanation of the text, often colorful and replete with realistic concrete description. It is indispensible to the study of the Talmud. Rashi's commentary is found on the same page as the text on which he is explicating and is cited to the author, the tractate of the Talmud under discussion, and the page (e.g., Rashi, *Sanhedrin* 3a).

Rashba (R. Solomon ben Abraham Adret; 1235-1310), a Spanish rabbi and scholar best known for his commentary on numerous tractates of the Talmud. Like the Rashi commentary, Rashba's comments follow the pagination of the Talmud and are cited in similar style.

Tosafot are collections of comments on the Talmud arranged according to the order of the talmudic tractates. These comments were written by the students of Rashi and their descendants and are found on the actual page of the text being explicated. They are cited in a manner similar to that of Rashi's commentary.

Rabbenu Nissim (R. Nissim ben Reuben Gerondi; 1310 (?)-1375 (?)), a Spanish talmudist best known for his commentary on the Talmud. His commentary is cited in a manner similar to that of the Rashi commentary.

Mordekhai (Mordekhai ben Hillel ha-Kohen; 1240 (?)-1298), author and rabbinic authority in Germany. Mordekhai's fame rests on his *Sefer Mordekhai*. This gigantic compendium consists of elaborations on talmudic problems.

R. Menaḥem ben Solomon Meiri (1249-1316), a scholar from Provence whose *Beit ha-Beḥirah*, a commentary on the Talmud, summarizes the subject matter of that work, giving both the meaning and the rule of law derived therefrom.

Rosh (R. Asher ben Jehiel; 1250-1327), a talmudist whose major work sums up the decisions of earlier codifiers and commentators. His work is cited by author, tractate, chapter, and comment (e.g., Rosh, *Shevu'ot* 7:4).

Aside from the commentaries and codes, rabbinic writings include a vast number of works from the responsa literature that provide great insight into the decisionmaking process of the Jewish judge. Prominent among the works cited by Rabbi Bleich are: M. Arak (d. 1926), *Teshuvot Imrei Yosher*; Y. Breisch, *Teshuvot Ḥelkat Ya'akov*; Y. Weinberg (1855-1966), *Seridei Esh*; E. Oshry (1915—), *She'elot u-Teshuvot mi-Ma'amakin*; A. Kahane-Shapiro (1870-1943), *Dvar Avraham*; A. Tavah, *Ḥut ha-Meshulash*; I. Isserlein (1390 (?)-1460), *Terumat ha-Deshen*. Such works are cited to the author, the work, and the responsum number.

The foregoing is substantially reprinted from Lamm & Kirschenbaum, Freedom and Constraint in the Jewish Judicial Process, 1 Cardozo L. Rev. 99, 99 Editor's note (1978).